Memorandum

To: Assistant United States Attorney
From: Ranja Rasul
Subject: Post-Indictment Delay
Date: April 20, 2017

Issues Presented

(1) If a fugitive is on the run specifically to avoid prosecution for crime #1, is that enough to defeat a claim for post-indictment delay for crime #2 when he did not know of the indictment for crime #2?

Short Answer

(2) Yes. If the defendant actively avoided detection for a crime, then any post-indictment delay will be attributable to him. Once held to be responsible for the delay, he waives any right to bring a claim that his right to a speedy trial was violated and therefore there is no such violation.

Brief Facts

Defendant, a United States citizen, was charged in the U.S. with a crime in 2000 and subsequently fled to Mexico to escape prosecution. In 2004, after he had already fled, he was indicted by U.S. government authorities for a different and unrelated crime. In 2017, he was arrested by Mexican authorities and deported back to the United States. For the purposes of this memo, we assume that authorities were not negligent during the period he was a fugitive and took reasonable steps to arrest him following his indictment.

Discussion

The Ninth Circuit has not yet considered a case where the defendant was a fugitive of an unrelated crime and was unaware of the indictment for the one at issue. However, under the "waiver" doctrine a court would hold that the defendant's decision to evade law enforcement for crime #1 constituted defendant's waiver of his speedy trial rights, and that the post-indictment delay for crime #2 is attributable to him and therefore not a violation of his due process rights.

The Ninth Circuit has adopted the waiver doctrine in cases where the defendant knowingly and intentionally evaded law enforcement to avoid arrest in the same case he later moves to dismiss for post-indictment delay, holding that where a defendant "'seeks to avoid detection by American authorities' and any post indictment delay can be attributed to him, he waives the right to a speedy trial."[1] *United States v. Sandoval*, 990 F.2d 481, 483 (9th Cir. 1993) (rights waived where defendant knew of indictment and skipped bail to become a fugitive until being arrested almost 21 years later) (quoting *United States v. Wangrow*, 924 F.2d 1434, 1437 (8th Cir. 1991)); *see also United States v. Manning*, 56 F.3d 1188, 1195 (9th Cir. 1995) (holding that if delay is attributable to defendant, he has waived his speedy trial right and there is no need to engage in the *Barker* analysis; thus no violation in case where defendant knew of indictment and resisted efforts to bring him to the United States resulting in a 30 month delay); *United States v. Aguirre*, 994 F.2d 1454, 1457 n.5 (9th Cir. 1993) (noting that in cases where "a defendant takes affirmative steps to elude law enforcement and thus causes the delay himself. . . a finding of waiver is proper and courts needn't perform the *Barker* balancing test").

[1] When a defendant brings a motion for post-indictment delay and has not waived his right, courts will look at several factors to determine whether a Sixth Amendment violation of the right to a speedy trial has occurred: the "length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendants." *Barker v. Wingo*, 407 U.S. 514, 528 (1972).

Where a defendant is unaware of an indictment, the Court will engage in the *Barker* analysis, focusing on the reason for delay[2] and determine whether the cause of the delay will weigh in favor of the government or the defendant depending on whom the delay can be attributed to, and what reasons were underlying it. *Barker*, 407 U.S. at 531. Deliberate delay by the government weighs heavily against the prosecution, while reasons that are more neutral will be weighed less heavily against it. *Id*. Valid reasons "such as a missing witness" should justify the delay, but "if delay is attributable to the defendant, then his waiver may be given under standard waiver doctrine[.]" *Id*. at 529, 531.

In these cases the Circuit has accepted that the government has some obligation to make efforts to find a fugitive, but it is not required to "make heroic efforts to apprehend a defendant who is purposefully avoiding apprehension." *Sandoval*, 990 F.2d at 485 (quoting *Rayborn v. Scully*, 858 F.2d 84, 90 (2d Cir. 1988)). As a result, violations only occur where the government has failed to exercise due diligence in attempting to inform and apprehend individuals who have been indicted. *See Doggett*, 505 U.S. at 657 (holding that the government's "egregious persistence in failing to prosecute" was sufficient for a speedy trial claim where defendant did not know of indictment until he was arrested and there was an 8-year delay); *United States v. Mendoza*, 530 F.3d 758 (9th Cir. 2008) (finding violation where defendant was never informed of indictment against him, there was no attempt to inform him, and there was delay of eight years); *cf. United States v. Corona-Verbera*, 509 F.3d 1105, 1115 (9th Cir. 2007) (analyzing due diligence by government under second *Barker* factor, reason for delay, and finding no violation where there was a nearly 8-year delay and the government exercised due diligence, but it is unclear whether defendant knew of indictments); *United States v. Sperow*, 494 F.3d 1223, 1225-

[2] This factor is especially important in fugitive cases because courts must consider "whether the government or the criminal defendant is more to blame for that delay." *Doggett v. U.S.*, 505 U.S. 647, 651 (1992).

26 (9th Cir. 2006) (finding the reason for a nearly 8-year delay was defendant's deliberate evasion, the government was reasonably diligent, and the district court found defendant, at the very least, "knew he was in trouble and intended to evade justice").

Again, the Ninth Circuit has not addressed the exact facts of this case, where a defendant knowingly evaded capture for one crime but did not know of the indictment for the second crime. However, the Second Circuit is instructive. In *Rayborn*, a state prisoner was appealing the denial of habeas relief by the district court on the basis that a seven-year delay in bringing him to trial violated his constitutional right to a speedy trial. 858 F.2d at 85. The defendant was suspected of a homicide in New York in 1971 and was shortly after arrested in Philadelphia for a completely unrelated homicide charge. *Id*. at 86. The Philadelphia police notified the New York police and New York issued a warrant for his arrest. *Id*. Before New York authorities could successfully execute the warrant, defendant was released and subsequently did not show up for any hearings related to the Philadelphia charge. *Id.* Later, in 1974, the defendant was rearrested in Philadelphia and an indictment was filed in New York for the homicide that occurred there. *Id*. Defendant was released again, but arrested based on the New York warrant shortly after. *Id*. It was at this point that the defendant first learned of the New York charges. *Id*. An error by the District Attorney's Office led to the defendant being released once more, and he was not heard from again until finally being recaptured in 1976. *Id*. The defendant was tried and convicted of the Philadelphia homicide and separate federal charges that had been pending since 1966. *Id*. Additional errors then led to defendant not being tried on the New York homicide charge until 1978, which defendant argued was a violation of his right to a speedy trial. *Id*. at 87.

Using the *Barker* factors, the court ruled against finding a violation because "most of the delay was caused by appellant's attempts to evade arrest," the delay due to the government was

due to a clerical error and not malfeasance, the assertion of his right was untimely, and he was not prejudiced by the delay. *Id*. at 89. While the Second Circuit does not invoke the waiver doctrine, it importantly found that defendant was responsible for the delay beginning in 1971, which included the period *before* he knew of the New York charges, because of his "fugitivity." *Id*. at 90. Similarly, the Court here would be likely to find the defendant was responsible for the delay due to being a fugitive who knowingly evaded police on the 2000 case, regardless of whether he knew of the 2004 indictment. Thus, under the waiver doctrine, it would likely rule against finding a Sixth Amendment violation.

Conclusion

The Ninth Circuit utilizes the waiver doctrine to determine whether there has been a violation of defendant's right to a speedy trial. As a result, a defendant who is a fugitive and has deliberately evaded prosecution cannot claim that there has been a violation, even if he was initially fleeing prosecution of a different unrelated crime and did not know of a new indictment. This is especially true where the government has made reasonable efforts to find and bring the defendant to trial.

Applicant Details

First Name	**Ariel**
Last Name	**Reiner**
Citizenship Status	**U. S. Citizen**
Email Address	**ariel.reiner@law.nyu.edu**
Address	**Address** Street **1500 Teaneck Road, Apartment 324** City **Teaneck** State/Territory **New Jersey** Zip **07666** Country **United States**
Contact Phone Number	**2012905272**

Applicant Education

BA/BS From	**Yeshiva University**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 20, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of International Law and Politics**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gillette, Clayton
clayton.gillette@nyu.edu
212-998-6749

Schulhofer, Stephen
stephen.schulhofer@nyu.edu
212-998-6260

Barkow, Rachel
barkowr@mercury.law.nyu.edu
212-992-8829

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ariel Reiner
1500 Teaneck Road, Apartment 324
Teaneck, NJ 07666
Ariel.Reiner@law.nyu.edu
(201) 290-5272

March 08, 2022

Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Dear Judge Liman,

I am a third-year law student at New York University School of Law with an expected graduation date of May 2022. I am writing to apply for a clerkship in your Honor's chambers for the 2023 term.

Accompanying this letter is my resume, law school transcript, undergraduate transcript, and two writing samples. One writing sample is a bench memo I wrote for Judge Richard Sullivan during my externship in his chambers this past fall. The other is a memo I wrote during my summer at Sullivan & Cromwell. Letters of recommendation from Professor Rachel Barkow (BarkowR@mercury.law.nyu.edu, 212-992-8829), Professor Stephen Schulhofer (schulhos@mercury.law.nyu.edu, 212-998-6260), and Professor Clayton Gillette (Gillette@mercury.law.nyu.edu, 212-998-6749) are attached.

I worked as a research assistant to Professor Barkow in the Spring 2021 semester, and took her Criminal Law course in the Fall 2019 semester. I took Professor Gillette's Contracts course in the Fall 2019 semester. I took Professor Schulhofer's Criminal Procedure course in the Fall 2020 semester. Additionally, Judge Sullivan has kindly agreed to serve as a reference and may be reached at Richard_Sullivan@ca2.uscourts.gov.

While working in Judge Sullivan's chambers this past semester, I spent much of my time working on his district court docket. This experience concretized my dream to serve as a clerk in the Southern District. It would be an honor and privilege to have the opportunity to fulfill that dream in Your Honor's chambers.

Please let me know if I can provide any additional information.

Thank you for your consideration.

Sincerely,

/S/ Ariel Reiner

ARIEL REINER

1500 Teaneck Rd., Apt. 324
Teaneck, NJ 07666
ariel.reiner@law.nyu.edu | (201) 290-5272

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2022
Honors: Robert McKay Scholar – a student in the top 25% based on their cumulative averages after four semesters
Journal of International Law and Politics, Notes Editor
Activities: Professor Daniel Capra, Teaching Assistant (Evidence)
Suspension Representation Project, Member
Tutoring Program, Peer Tutor (Criminal Law and Contracts)

YESHIVA UNIVERSITY, YESHIVA COLLEGE, New York, NY
B.A., in Political Science with a Minor in History, *summa cum laude*, May 2018
Honors: Ruth A. Bevan Political Science Award; Award for Excellence in Humanities and Jewish Studies
Dean's List (all semesters); Dean's Scholar, Academic Scholarship Awardee
Yeshiva University Student Court, Justice
Activities: S. Daniel Abraham Israel Program, Student Ambassador
Wilf Campus Writing Center, Tutor
Study Abroad: Yeshivat Sha'alvim, Sha'alvim, Israel, Fall 2013-Spring 2014 & Fall 2014-Spring 2015

EXPERIENCE

THE HONORABLE RICHARD SULLIVAN, UNITED STATES COURT OF APPEALS, SECOND CIRCUIT, New York, NY
Judicial Extern, September 2021-December 2021
Drafted summary orders and bench memos regarding appeals related to sentencing, ineffective assistance of counsel, and contract disputes. Drafted orders to parties in matter relating to compassionate release motions.

SULLIVAN & CROMWELL LLP, New York, NY
Summer Associate, May 2021-July 2021
Drafted advisory memo and revised by-laws for legal non-profit organization appointing federal judge to Treasurer position. Conducted extensive research including for Delaware shareholder derivative lawsuit, and multi-state tort liability litigation.

PROFESSOR RACHEL BARKOW, NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Research Assistant, January 2021-May 2021
Updated and edited chapter on excuses and defenses for next edition of criminal law casebook co-authored by Professor Barkow. Drafted notes and implemented new case law and journal articles for casebook.

U.S. ATTORNEY'S OFFICE, EASTERN DISTRICT OF NEW YORK, Brooklyn, NY
Summer Intern, May 2020-July 2020
Worked closely with an Assistant United States Attorney on a range of matters, including drafting a Rule 12 Motion to Dismiss in an action relating to federal student loans on behalf of Department of Education. Conducted extensive legal research on a variety of complex issues, including claims relating to the Federal Medical Care Recovery Act, Bivens actions, and CERCLA liens. Observed training seminars, gaining familiarity with legal concepts and issues.

TABC HIGH SCHOOL, MOCK TRIAL TEAM, Teaneck, NJ
Head Coach, August 2018-June 2019
Instructed students regarding opening statements, closing statements, witness examinations, and evidentiary rules.

ADDITIONAL INFORMATION

Fluent in Hebrew. Enjoy playing guitar and cantorial singing. Black belt in karate. Served as a Division Head at Camp Kaylie, a summer camp that integrates developmentally-disabled and typically-functioning children.

Name: **Ariel N Reiner**
Print Date: **02/27/2022**
Student ID: **N11787627**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: David Simson			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Rachel E Barkow			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Burt Neuborne			
Contracts	LAW-LW 11672	4.0	A-
Instructor: Clayton P Gillette			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
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Property	LAW-LW 10427	4.0	CR
Instructor: Katrina M Wyman			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: David Simson			
Legislation and the Regulatory State	LAW-LW 10925	4.0	CR
Instructor: Emma M Kaufman			
Torts	LAW-LW 11275	4.0	CR
Instructor: Barry E Adler			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A
Instructor: Stephen J Schulhofer			
What We Owe to Others: Ethics of Obligation	LAW-LW 11119	2.0	A
Instructor: Moshe Halbertal			
Basic Bankruptcy	LAW-LW 11460	4.0	B+
Instructor: Arthur Joseph Gonzalez			
Evidence	LAW-LW 11607	4.0	A-
Instructor: Daniel J Capra			
What We Owe to Others- Writing Cr	LAW-LW 11643	1.0	A
Instructor: Moshe Halbertal			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Survey of Securities Regulation	LAW-LW 10322	4.0	A-
Instructor: Stephen J Choi			
Corporations	LAW-LW 10644	5.0	A-
Instructor: Marcel Kahan			
Alternative Dispute Resolution	LAW-LW 11368	3.0	A-
Instructor: Rebecca Price			
Research Assistant	LAW-LW 12589	1.0	CR
Instructor: Rachel E Barkow			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	58.0	58.0

McKay Scholar-top 25% of students in the class after four semesters

Fall 2021

School of Law
Juris Doctor
Major: Law

Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	3.0	B
Instructor: Barbara Gillers			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Daniel J Capra			
Constitutional Law	LAW-LW 11702	4.0	B+
Instructor: Adam M Samaha			
Federal Judicial Practice Externship	LAW-LW 12448	3.0	CR
Instructor: Michelle Beth Cherande Alison J Nathan			
Federal Judicial Practice Externship Seminar	LAW-LW 12450	2.0	CR
Instructor: Michelle Beth Cherande Alison J Nathan			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	72.0	72.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	***
Instructor: Samuel Issacharoff Arthur R Miller			
Journal of International Law & Politics	LAW-LW 10935	1.0	***
Federal Courts and the Federal System	LAW-LW 11722	4.0	***
Instructor: Helen Hershkoff			
National Security Law	LAW-LW 12256	2.0	***
Instructor: Ryan Goodman Andrew Weissmann			

	AHRS	EHRS
Current	11.0	0.0
Cumulative	83.0	72.0

Staff Editor - Journal of International Law & Politics 2020-2021

End of School of Law Record

Date Issued: 11-JAN-2021

Yeshiva University
Yeshiva College
500 W. 185th Street
New York NY 10033-3201

Ariel N Reiner

Student ID: 142-98-6184
Date of Birth: 14-MAY
Admit Term: Fall 2013
Program: Bachelor of Arts

Conferred Degree: BA 31-MAY-2018
Major1: Political Science
Minor(s): History

Conferred Degree: AA 31-MAY-2018
Major1: Jewish Studies

Honors:

Summa Cum Laude

Events:

Dean's List 2015-2016
Dean's List 2016-2017
Dean's List 2017-2018

TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:

2012 Advanced Placement

HIS	2005	Survey of US History	3.00
HIS	2006	Survey of US History II	3.00

Att-Hrs: 6.00 Ehrs: 6.00 Qpts: 0.00 GPA: 0.000

2013 Advanced Placement

POL	1040	Amer Govt & Politics	3.00

Att-Hrs: 3.00 Ehrs: 3.00 Qpts: 0.00 GPA: 0.000

INSTITUTION CREDIT:

Fall 2013

HES	1900	IP: Shaalvim for Men	16.00

Att-Hrs: 16.00 Ehrs: 16.00 Qpts: 0.00 GPA: 0.000
Cumu-Ahrs: 25.00 Ehrs: 25.00 Qpts: 0.00 GPA: 0.000

Spring 2014

HES	1900	IP: Shaalvim for Men	16.00

Att-Hrs: 16.00 Ehrs: 16.00 Qpts: 0.00 GPA: 0.000
Cumu-Ahrs: 41.00 Ehrs: 41.00 Qpts: 0.00 GPA: 0.000

Fall 2014

REG	0901	LOA: Extended Study in Israel	0.00

Att-Hrs: 0.00 Ehrs: 0.00 Qpts: 0.00 GPA: 0.000
Cumu-Ahrs: 41.00 Ehrs: 41.00 Qpts: 0.00 GPA: 0.000

Spring 2015

REG	0902	LOA: Extended Study in Israel	0.00

Att-Hrs: 0.00 Ehrs: 0.00 Qpts: 0.00 GPA: 0.000
Cumu-Ahrs: 41.00 Ehrs: 41.00 Qpts: 0.00 GPA: 0.000

Fall 2015

BIB	1000	Bible:Text, Context, Tradition	2.00 A
CUOT	1021	Democratic Political Culture	3.00 A
FYWR	1020	First Year Writing	3.00 A
HBSI	1014	American Public Policy	3.00 A-
HIS	2607H	International Crimes	3.00 A-

Att-Hrs: 14.00 Ehrs: 14.00 Qpts: 54.00 GPA: 3.857
Cumu-Ahrs: 55.00 Ehrs: 55.00 Qpts: 54.00 GPA: 3.857

Spring 2016

HEB	1305	Advanced Hebrew I	3.00 A
HIS	1201	Survey of US History I	3.00 A
POL	1301	Intro International Politics	3.00 A
POL	1401H	Great Political Thinkers	3.00 A
POL	3306	Israeli Foreign Policy	3.00 B+

Att-Hrs: 15.00 Ehrs: 15.00 Qpts: 58.00 GPA: 3.866
Cumu-Ahrs: 70.00 Ehrs: 70.00 Qpts: 112.00 GPA: 3.862

Fall 2016

BIB	2740	Job	2.00 A
HEB	1306	Advanced Hebrew II	3.00 A
JHI	1200	Classical Jewish History	3.00 A
POL	1305H	American Foreign Policy	3.00 A
POL	3115H	Presidential Elections	3.00 A

Att-Hrs: 14.00 Ehrs: 14.00 Qpts: 56.00 GPA: 4.000
Cumu-Ahrs: 84.00 Ehrs: 84.00 Qpts: 168.00 GPA: 3.907

Spring 2017

BIB	2820	Ezra-Nehemiah	2.00 A
HIS	2601	History of the Law	3.00 A
JHI	1855	Conversion to & from Judaism	3.00 A
POL	2100	The American Presidency	3.00 A
POL	3205	Adv. Capitalist Democracies	3.00 A

Att-Hrs: 14.00 Ehrs: 14.00 Qpts: 56.00 GPA: 4.000
Cumu-Ahrs: 98.00 Ehrs: 98.00 Qpts: 224.00 GPA: 3.929

Fall 2017

COWC	1014	American Musical Cultures	3.00 A
JHI	3230	Religion & Politics Jew. Antiq	3.00 A
POL	1501	Fundamentals of Political Sci.	3.00 A


University Registrar

Date Issued: 11-JAN-2021

Yeshiva University
Yeshiva College
500 W. 185th Street
New York NY 10033-3201

Ariel N Reiner

Student ID: 142-98-6184
Date of Birth: 14-MAY
Admit Term: Fall 2013
Program: Bachelor of Arts

Conferred Degree: BA 31-MAY-2018
Major1: Political Science
Minor(s): History

Conferred Degree: AA 31-MAY-2018
Major1: Jewish Studies

SUBJ	NO	COURSE TITLE	CRED	GRD
POL	2330	Terrorism	3.00	A
POL	2505	Writing Politics:Dir. Research	3.00	A

Att-Hrs: 15.00 Ehrs: 15.00 Qpts: 60.00 GPA: 4.000
Cumu-Ahrs: 113.00 Ehrs: 113.00 Qpts: 284.00 GPA: 3.944

Spring 2018

SUBJ	NO	COURSE TITLE	CRED	GRD
BIB	2120	Judges	2.00	A
ENG	1601	Journalism: Digital Newsroom	3.00	A
HES	1131	Hebrew Lang & Lit (MYP)	1.00	P
INTC	1016	Culture of the Fin de Siecle	3.00	B+
NAWO	1010	Biomedical Research	3.00	A-
POL	2293	Tp:Israeli-Palestinian Conflct	2.00	A
POL	4901	Independent Study	1.00	A

Att-Hrs: 15.00 Ehrs: 15.00 Qpts: 53.00 GPA: 3.785
Cumu-Ahrs: 128.00 Ehrs: 128.00 Qpts: 337.00 GPA: 3.918

******************* TRANSCRIPT TOTALS *******************

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION:	119.00	86.00	337.00	3.918
TOTAL TRANSFER:	9.00	0.00	0.00	0.000
OVERALL:	128.00	86.00	337.00	3.918

******************* END OF TRANSCRIPT *******************

University Registrar

Date Issued: 11-JAN-2021

Yeshiva University
S. Daniel Abraham Israel Program
500 W. 185th Street
New York NY 10033-3201

Ariel N Reiner

Student ID: 142-98-6184 Anticipated Degree: NONE
Date of Birth: 14-MAY Major1: No Major
Admit Term:

INSTITUTION CREDIT:

Fall 2013

SUBJ	NO	COURSE TITLE	CRED	GRD
JST	4991	Topics in Jewish Studies I	2.00	P
JST	4992	Topics in Jewish Studies II	2.00	P
JTH	4991	Topics in Jewish Thought I	2.00	P
JUD	4991	Topics in Judaic Studies I	3.00	P
TAL	4991	Topics in Talmud I	3.00	P
TAL	4992	Topics in Talmud II	2.00	P
TAN	4991	Topics in Tanakh I	2.00	P

Att-Hrs: 16.00 Ehrs: 16.00 Qpts: 0.00 GPA: 0.000
Cumu-Ahrs: 16.00 Ehrs: 16.00 Qpts: 0.00 GPA: 0.000

Spring 2014

SUBJ	NO	COURSE TITLE	CRED	GRD
JST	4993	Topics in Jewish Studies III	2.00	P
JTH	4992	Topics in Jewish Thought II	2.00	P
JUD	4992	Topics in Judaic Studies II	3.00	P
JUD	4993	Topics in Judaic Studies III	2.00	P
TAL	4993	Topics in Talmud III	3.00	P
TAL	4994	Topics in Talmud IV	2.00	P
TAN	4992	Topics in Tanakh II	2.00	P

Att-Hrs: 16.00 Ehrs: 16.00 Qpts: 0.00 GPA: 0.000
Cumu-Ahrs: 32.00 Ehrs: 32.00 Qpts: 0.00 GPA: 0.000

********** **TRANSCRIPT TOTALS** **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION:	32.00	0.00	0.00	0.000
OVERALL:	32.00	0.00	0.00	0.000

********** **END OF TRANSCRIPT** **********

University Registrar

New York University
A private university in the public service

Clayton P. Gillette
Max E. Greenberg Professor of Contract Law

Dear Judge:

I am writing on behalf of Ariel Reiner, an expected May 2022 graduate of NYU School of Law who has informed me that he has applied for a clerkship with you following his graduation. Ariel was a student in my Contracts course during his first semester in law school, and it is on the basis of his performance in that class that I feel confident speaking about his qualifications.

Ariel was one of primary contributors to the dynamic conversation of the classroom. Although he often volunteered to address doctrinal issues, it quickly became clear that he was far more interested in addressing complicated policy debates and methodological issues in the analysis of contract law. Thus, while Ariel's frequent contributions consistently displayed both doctrinal sophistication and full preparation, he was most interesting, and most successful, when he applied that same analytical acumen to difficult issues of economic or philosophical analysis underlying the doctrine. In discussions where students disputed doctrine and policy, Ariel was assertive without being arrogant, and challenging without being argumentative or contentious. That is not to say that he was an ideologue. Instead, he was an equal opportunity critic, always pushing the inquiry, especially when he wanted to challenge the professor. Of course, his challenges were always issued with civility and respect. He was quick to perceive the uncertainty in the reasonable ways in which a dispute could be resolved and sought credible and creative analyses for selecting among alternatives. He consistently raised points that advanced debate. I recall multiple occasions in which I thought a point I had made would end the discussion, but Ariel raised his hand to express an alternative, and often compelling, perspective. In short, his skill in the classroom made him one of the most helpful and sophisticated members of an extraordinarily talented class. I was not at all surprised, therefore, that Ariel's exam was one of the best in the class, and earned one of the few A-'s that I am allowed to give under NYU's strict curve for first-year grades.

While I do not know Ariel well outside the classroom, his demeanor in that setting indicates that he would be a delight in any chambers. He brings to the enterprise an admirable degree of introspection and thoughtfulness. I encourage you to give him the most serious consideration. Please let me know if I can provide any additional information.

Sincerely,

Clayton P. Gillette

40 Washington Square South ● New York, NY 10012 ● (212) 998-6749 ● fax (212) 995-4590 ● clayton.gillette@nyu.edu

New York University
A private university in the public service

School of Law
40 Washington Square South, Room 322B
New York, NY 10012

Professor Stephen J. Schulhofer
Robert B. McKay Professor of Law

212-998-6260 (tel)
212-995-4030 (fax)
stephen.schulhofer@nyu.edu

June 10, 2021

Re: Ariel Reiner

Dear Judge:

Ariel Reiner is applying for a clerkship in the current application cycle. I recommend him very highly.

I met Ariel when he was a student in my criminal procedure/police practices course in the Fall term 2020. Although the class was conducted remotely via Zoom, Ariel participated actively. He was a stand-out for his thoughtful, precise comments and questions, even in a fairly large class that was exceptionally engaged, in the wake of the George Floyd killing and other racial justice issues that were even more salient than usual on the public agenda this past year. Ariel also was a frequent participant in office-hour discussions (also conducted via Zoom). Again his questions and comments were unusually insightful and precise; more than once he surprised me with questions based on very rigorous reading of the material, which led him to nuances that I myself had missed. I was not surprised when Ariel's anonymously graded exam (an A) placed him in the top 10% of this exceptionally engaged class.

Ariel's other grades have been outstanding as well, and he has been selected to be a Staff Editor of NYU's student-edited *Journal of International Law and Politics*.

On a personal level, my contact with Ariel has been limited to course-related discussion in class and office hours, both conducted entirely by Zoom. Even so, it was easy to see that Ariel is extra-smart, super-serious, often quick to see subtle nuances, and persistent in digging deeply into the legal issues under discussion.

One caveat is necessary to put my recommendation in perspective. I have not seen the kind of extended research and writing that are important to a judge. Nonetheless, Ben's thoughtfulness and strong academic record give me confidence that he would be a valuable law clerk. I recommend him very highly.

Please do not hesitate to contact me if I can provide any additional information.

Sincerely,

Stephen J. Schulhofer
Robert B. McKay Professor of Law

New York University
A private university in the public service

School of Law

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New York, New York 10012-1099
Telephone: (212) 992-8829
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Email: rachel.barkow@nyu.edu

Rachel E. Barkow
Vice Dean and Charles Seligson Professor of Law
Faculty Director, Center on the Administration of Criminal Law

June 10, 2021

Dear Judge:

I am writing to recommend Ariel Reiner for a clerkship in your Chambers. Ariel was a student in my criminal law class during his 1L year, and he served as a research assistant for me this past semester. In both contexts, Ariel's intelligence and work ethic have stood out. I recommend him to you with enthusiasm.

Ariel took my criminal law class in the fall semester of his 1L year. I could always count on him to raise smart and interesting points in class discussion. We have anonymous grading at NYU, and when I saw the list of names matched to the exam scores, I was not surprised to see Ariel had earned one of only 10 A grades in the class. His exam performance matched his in-class participation. He has an impressive ability to spot issues and analyze them from all the relevant perspectives. He has a sharp, analytical mind well suited for legal questions.

On the basis of Ariel's outstanding performance in my class, I hired him to be one of my research assistants this past semester. Ariel's task was to update the section of the criminal law casebook I co-edit that covers excuses. Ariel's work was exemplary. His research was thorough, and his suggestions of new material to include were spot-on. Ariel is also a clear and effective writer. He suggested large amounts of new material, and his write-ups were excellent. He also suggested probing questions to go along with the new material he included.

I am particularly impressed that Ariel was able to juggle his research for me with a demanding course load. Because of a misunderstanding, Ariel ended up doing even more work on the casebook and covered the material on justifications as well. As a result, he ended up editing more than 200 pages of material, all while continuing to keep up with his classes and extracurricular activities. He never once complained; he cheerfully completed the assignment and did a great job.

I am confident Ariel will be an outstanding law clerk and get along with everyone in your Chambers.

Please do not hesitate to let me know if you have any additional questions.

Sincerely,

Rachel E. Barkow
Professor of Law

To: Judge Richard J. Sullivan
From: Ariel Reiner
Re: _____ *v.* _____, No. _____
To be argued: DATE (___, RJS, ___) (10 mins per side)

Appellant appeals an order of the district court (___, *J.*, S.D.N.Y.), holding that the mediation agreement signed by Appellant and her employer, Appellee, was enforceable. **[Blue at 3; A 122.]** The mediation followed Appellant's complaint alleging discrimination on the basis of race in violation of Title VII of the Civil Rights Act of 1964 as codified in 42 U.S.C. § 2000e *et seq.* **[Blue at 1.]** Appellant points to a number of factors, including the alleged intention to be bound by a later agreement, lack of partial performance following the agreement, missing material terms from the mediation agreement, and the lack of a final writing to demonstrate unenforceability of the signed mediation agreement. Appellant further argues that she signed the agreement under duress and therefore should not be enforceable. **[Blue at 2.]** Appellee, in turn, argues the mediation agreement was binding and no duress occurred. **[Red at 7-9.]**

This memo will address the arguments brought by Appellant and Appellee relating to the binding nature of signed preliminary agreements. For the reasons set forth below, I respectfully recommend that the panel **AFFIRM** the district court's decision but issue an opinion supporting the enforceable nature of preliminary agreements signed at mediation, given the lack of Circuit precedent on this issue. (addressed in "Part IV. C").

I. Background

Appellant filed an employment discrimination complaint on [date]. **[A 9-17.]** In it she alleged, *inter alia*, lack of promotion, employment terms and conditions different from that of similar employees, retaliation, and harassment or creation of a hostile work environment. **[A 13.]** From November 2016 to September 2018, Appellant applied for nine promotions and was not interviewed or hired due to a stated lack of requisite experience, despite allegedly having the listed required qualifications. **[A 17.]**[1]

On [date], the district court referred the matter to mediation, and on [date], a mediation session was held. **[Blue at 7.]** On the same day, the parties signed a mediation agreement on a pre-printed form provided by the district court. **[*Id.*]** The agreement began with the pre-printed statement that the parties agree that "following mediation, agreement has been reached on all issues." **[A 42.]** In the space below, the parties laid out an agreement which delineated what would be provided to Appellant:

1) One year's worth of salary as of the day of the mediation;
2) Two months' worth of COBRA premium contributions; and
3) Regular pay and benefits through [date].

[*Id.*]

[1] For a full supplement of her claims, **[see A 14-17,]** omitted here as it is outside the scope of the issue on appeal.

The agreement also stated that in exchange for these payments, the instant action would be discontinued with prejudice and there would be a general release from all claims brought by Appellant. **[*Id.*]** The agreement concluded by stating, "A full settlement agreement w[ith] applicable releases will follow." **[*Id.*]**

On [date], Appellant called the district court and expressed a desire to reject the agreement and was instructed to send an email to the court which she did on [date]. **[A 63-4.]** In the email, Appellant alleged that the agreement was signed under duress. Specifically, she alleged that after she told her legal representative, Toes Keane, she did not want to sign, Keane responded "mediation was the nicer portion of [the] lawsuit." **[A 68.]** She also alleged that the mediator told her that in litigation Appellant, "would be stuck in a room filled with white men that would question every aspect of my life for hours." **[*Id.*]** Appellant reported having asked if she could have until the following Monday to consider the agreement and being told no and relayed that following pressure from her representative and the mediator, she felt she had no choice but to sign. **[*Id.*]**

On [date], the same day Appellant contacted the court about rejecting the agreement, she reported that she wished to return to work but her counsel advised her not to. **[A 64.]** The next day, [date], her supervisor informed her work team that she had quit. **[*Id.*]** On [date], Appellee "paid Appellant for all outstanding hours that she had worked, as well as for one additional week and all accrued leave, as called for under the Alleged Agreement." **[Blue at 11.]** Appellee and its counsel allege that the instruction to pay Appellant at the slated pay period was made before they were made aware of her intention to reject the agreement. **[A 76**; **Red at 18.]** On [date], payment of COBRA benefits was made to Appellant.

The district court referred the matter to Magistrate Judge ___ who on [date], issued a report recommending enforcing the agreement. **[A 80-110.]** On [date], the district court adopted that recommendation. **[A 111-121.]** Appellant appealed the decision to this Court.

II. Standard of Review

This Court "review[s] a district court's factual conclusions related to a settlement agreement, such as whether an agreement exists or whether a party assented to the agreement, under the clearly erroneous standard of review." *Omega Engineering, Inc. v. Omega, S.A.*, 432 F.3d 437, 443 (2d Cir. 2005). This Court "review[s] de novo a district court's legal conclusions with respect to its interpretation of the terms of a settlement agreement . . . and its interpretation of state law." *Id.*; *see Ciaramella v. Reader's Dig. Ass'n, Inc.*, 131 F.3d 320, 322 (2d Cir. 1997).

III. Discussion

Issue 1: Did the district court err in finding that the agreement signed by the parties at the mediation was enforceable?

Recommendation: No. Even though Murphy makes some compelling arguments demonstrating a lack of intent to be bound, when utilizing the Circuit's test to determine parties' intent, it is clear they intended to be bound by the agreement.

A. Applicable Law

"Ordinarily, where the parties contemplate further negotiations and the execution of a formal instrument, a preliminary agreement does not create a binding contract. In some circumstances, however, preliminary agreements can create binding obligations." *Adjustrite Systems, Inc. v. GAB Business Services, Inc.*, 145 F.3d 543, 548 (2d Cir. 1998). The Court in *Adjustrite* held that when the parties agree on all points that require negotiation but agree to formalize the agreement in a later document, the preliminary agreement is fully binding. *Id.* at 548. "The key, of course, is the intent of the parties: whether the parties intended to be bound, and if so, to what extent." *Id.* at 548-59.

This Court, applying New York Law, has identified a four-factor test to determine whether parties who have signed a preliminary agreement intended to be bound by that agreement, or only by the later more formal agreement. The four factors are: "(1) Whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) Whether there has been partial performance of the contract; (3) Whether all of the terms of the alleged contract have been agreed upon; and (4) Whether the agreement at issue is the type of contract that is usually committed to writing." *Winston v. Mediafare Ent. Corp.*, 777 F.2d 78, 80 (2d Cir. 1985) (citing *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 75-77 (2d Cir. 1984)).

Some lower courts have determined whether parties entered a binding agreement without referring explicitly to the *Winston* factors, or by discussing only some of them. *See, e.g., Khalian v. Skintej*, No. 15 Civ. 1318, 2016 WL 10566660, at *2 (S.D.N.Y. Dec. 2, 2016) (noting the "final and binding" nature of an agreement following a mediation session and holding it was enforceable). However, because the Second Circuit has clearly delineated this test, see *Ciaramella*, 131 F.3d at 323, and because both parties and the lower court adopted this test, **A 91**, the analysis will be conducted through this test.

B. Application

1. Express Reservation of the Right not to be Bound

"The first factor, the language of the agreement, is 'the most important'" to determine whether the parties intended to be bound by the initial agreement. *Adjustrite*, 145 F.3d at 549. Here, the language tilts towards such an intention. As Magistrate Judge ___ noted in his report (adopted by the district court), the mediation agreement here refers to a successful agreement three different times: First in the title of the document, "Mediation Agreement"; second, in the

introductory language "IT IS HEREBY AGREED…"; third, in the introductory sentence, which states in part, "following mediation, agreement has been reached on all issues." **[A 42; A 94-95.]**

District courts in this circuit have repeatedly found that agreements resulting from court ordered mediation, such as here, with similar language to this one, reflect the intent to be bound by the agreement. In one case, also an employment discrimination case, the parties signed an agreement which stated, "[t]he parties have reached an agreement to settle the above-referenced lawsuit," while the document, like here, anticipated a more formal agreement later, and the court found it to be enforceable. *McLeod v. Post Graduate Center for Mental Health*, No. 14 Civ. 10041, 2016 WL 6126014, at *2-3 (S.D.N.Y. Sept. 30, 2016); *See Lewis v. New York City Transit Authority*, No. 04 CV 2331, 2015 U.S. Dist. LEXIS 84086, at *2-3 (E.D.N.Y. June 22, 2015) (finding an agreement with the phrase "The parties agreed to settle the above-captioned case pursuant to the following term," to be binding); *Little v. Greyhound Lines, Inc.*, No. 04 Civ. 6735, 2005 WL 2429437 (S.D.N.Y. Sept. 30, 2005) (finding an agreement with the phrase, "Following mediation the parties have reached a settlement agreement and will file the appropriate papers," to be binding).

Appellant makes a number of arguments to show there was an express intention not to be bound by the signed agreement. She cites Appellee's memorandum of law in support of enforcement, which says, "Defendant is also willing to pay the settlement sum to Plaintiff upon the execution of the full agreement negotiated between the parties." **[A 61.14.]** Appellant argues that this indicates Appellee's desire not to be bound until a formal agreement is signed. **[Blue at 12.]** This argument has no merit. At that point the parties were disputing the binding nature of the mediation agreement and Appellee seems to simply be saying if the final agreement were now signed and the dispute ended, they would pay the settlement sum. Further, this statement has little to no relevance as to whether the mediation agreement itself expressed reservations of the right not to be bound.

Appellant further contends that the phrase "A full settlement agreement w[ith] applicable releases will follow," indicates a desire not to be bound until the final agreement. But as indicated above, district courts in this circuit have repeatedly found mediation agreements with similar language enforceable, as did the district court in this case. Further, the phrase "applicable releases" seems clearly to refer to the specified terms above it not new material terms.

Finally, Appellant points to a merger clause in the proposed final agreement which states, "This is the parties' entire agreement as to the subject matter hereof and it may not be modified except by a mutually signed written agreement," **[A 53,]** to indicate an intent not to be bound by the initial agreement. **[Blue at 23.]** Appellant cites to *Ciaramella* where the Court noted that, "[t]he presence of such a merger clause is persuasive evidence that the parties did not intend to be bound prior to the execution of a written agreement." 131 F.3d at 324. As the district court notes, *Ciaramella* was a case of a written agreement following an allegedly binding oral agreement and should be read to support the proposition that parties to an oral agreement only intended to be bound only after a written agreement is signed. **[A 115.]** Here, there is such a writing and the logic of *Ciaramella* is inapposite.

Both district caselaw as to mediation agreements, as well as the language of the mediation agreement in this case, indicate an intent by the parties to be bound by the signed agreement.

2. Partial Performance by the Parties

Appellee asserts that there was partial performance by both parties following the signing of the mediation agreement. First, Appellee argues that the fact that Appellant did not try to return to work following the mediation agreement illustrates Appellant's understanding that she was no longer employed by Appellee, and constitutes performance. **[Red at 21.]** This argument bears little weight. Appellant did not return to work due to advice she received from counsel and her union representative, not because she thought her employment had ended. **[A 97.]**

Next, Appellee argues that the fact that they paid Appellant for the week she did not return to work, a provision of the mediation agreement, indicates performance. **[Red at 18.]** The parties dispute when initiation of this payment took place. Appellant argues Appellee didn't begin this payment until they learned of the repudiation. **[Blue at 31.]** Appellee points to its attorney's declaration to enforce the settlement where he states, "Before Plaintiff informed Plaintiff s counsel, Defendant, or Defendant's counsel that she wished to renege, I instructed Defendant to set up Plaintiff s payment for the 'regular pay… until [date] and unused PTO for the next pay period ([date]), which Defendant did." **[A 76.]** Further, Appellant did not return the money, **[A 98,]** something she seemingly should have done if there was in her mind no enforceable agreement. It is impossible to know for certain the timeline here but since Appellant accepted payment, the attorney statement was made under penalty of perjury, and accepting the lower court's factual findings, it should be presumed that partial performance did occur before knowledge of repudiation.

Appellant, in turn, argues that any performance by Appellee took place after the repudiation of the agreement and therefore should not constitute performance. **[Blue at 28.]** As noted above, that is not true, at least as far as the pay for missed work. Appellant argues COBRA benefits were only paid after repudiation and therefore should not constitute performance. **[Blue at 11-12.]** While Appellant admits to calling COBRA administrators, she alleges it was only to ascertain the status of her coverage, not to accept payment. **[Blue at 30.]** Appellant further argues that if Appellee intended to be bound, they would have afforded COBRA coverage much earlier than they did. **[Blue Reply at 16.]** The district court, adopting the magistrate report, rejected this claim. **[A 118]** ("Plaintiff's arguments about the timing of the COBRA funding are tangential to the fact that Plaintiff sought to take advantage of the benefits of the Mediation Agreement, further evincing an understanding that it was binding on the Parties."). This is not a clearly erroneous conclusion. **[*See* A 98]** ("The parties disagree about whether Plaintiff actually elected COBRA coverage on [date], when she called Infinisource, the COBRA administrator. The documentary evidence indicates that Plaintiff did elect coverage. (See Second LaRose Decl. 6(a) and Ex. 7.) Regardless, and without resolving that particular factual dispute, the Court still concludes that Plaintiff understood the Mediation Agreement to be binding and sought to take advantage of its benefits.").

Given the totality of the evidence, it seems clear both parties partially performed following the mediation agreement's signing.

3. Agreement on all Terms

Appellant cites to *Winston* which states that this third factor weighs in favor of enforcement only when there is "literally nothing left to negotiate." *Winston*, 777 F.2d at 82; **[Blue at 37.]** She further cites *Ciaramella* which states, "[T]he existence of even 'minor' or 'technical' points of disagreement in draft settlement documents [a]re sufficient to forestall the conclusion that a final agreement on all terms had been reached." *Ciaramella*, 131 F.3d at 325 quoting *Winston*, 777 F.2d at 82-83; **[Blue at 37.]** However, as was stated above, "preliminary agreements can create binding obligations." *Adjustrite Systems, Inc.*, 145 F.3d at 548. This includes, "when the parties agree on all the points that require negotiation (including whether to be bound) but agree to memorialize their agreement in a more formal document." *Id.*

Appellant nonetheless argues that not all material terms were agreed upon, and therefore this isn't the type of agreement *Adjustrite* had in mind. Specifically, Appellant points to the absence of the scope of release, confidentiality requirements, requirements to return property, requirements with respect to references, recommendations and prohibitions of disparagement, language limiting admission of liability, and allocation of settlement for tax purposes in the signed agreement, all of which are mentioned in the proposed final agreement. **[Blue at 25.]**

This argument is compelling. But as the district court found in adopting the magistrate court's recommendation, the court "knows of no case holding that parties cannot have an enforceable settlement agreement of an employment discrimination dispute without including terms addressing confidentiality, non-disparagement, and the like." **[A 119.]** Further the court found that, "[n]othing in the record indicates that either party raised the additional terms at the mediation or that they were a source of dispute before, during, or after the mediation." **[*Id.*]**

The caselaw Appellant cites to support her claim is also inapposite. For instance, Appellant cites *Clark v. Gotham Lasik, PLLC*, a case surrounding a court ordered mediation, which states that a "discussion by parties of the need for a formal settlement agreement and subsequent negotiations regarding the terms of the agreement 'approach an express reservation of the right not to be bound until a written settlement agreement was executed.'" 2012 WL 987476, at *3 (S.D.N.Y. March 2, 2012). But in *Clark*, the agreement following mediation was oral, and therefore the *Adjustrite* rule that preliminary agreements can create binding obligations is less applicable, whereas here a written agreement was signed. Appellant cites to another instance where the district court found an agreement to be unenforceable, but in this case too, the parties only agreed orally. *See, e.g., Lyman v. New York Presbyterian Hosp.*, No. 11 CIV. 3889 AJN JCF, 2013 WL 427178 (S.D.N.Y. Feb. 1, 2013).

That being said, the lower court's decision could have gone the other way regarding the outstanding terms. The fact that these terms weren't negotiated at mediation could be because it was agreed that they would be discussed later. Further, the lack of caselaw holding the terms left out are not material does not mean another court will not eventually find them to be material. After all, what is or isn't "boilerplate language" in a subsequent formal agreement is subjective. **[*See* A 103]** ("The Court agrees that some of the terms added to the Full Agreement, such as the no admission, merger, and execution-in-counterparts clauses, are boilerplate. The Court does not

agree, however, that all additional terms, such as the amount of penalty for breaching confidentiality, or the non-mutuality of the non-disparagement clause, are mere boilerplate."). This could lead to confusion in district court mediation programs as to what needs to be included in the agreement signed at mediation to ensure it has binding force. A clear holding by this Court indicating that the document signed at the end of mediation is binding, would put these questions to rest.

4. Commitment to Writing

The Second Circuit has held that "settlements of any claim are generally required to be in writing or, at a minimum, made on the record in open court." *Ciaramella*, 131 F.3d at 326. Here, the parties did in fact put the terms of the settlement into a writing and signed that agreement. The lower court acknowledged that employment discrimination cases are often memorialized in a more formal writing. **[A 104; 119.]** But, as made clear by ample precedent, they are often not settled in that manner, and end with a mediation agreement, as was the case here. **[A 104]** citing *Khalian*, 2016 WL 10566660, at *2 (memorandum of agreement); *McLeod*, 2016 WL 6126014, at *3 (memorandum of understanding); *Lewis*, 2015 U.S. Dist. LEXIS 84086, at *15 (term sheet); *Wang v. Int'l Bus. Machines Corp.*, No. 11 CV 2992 VB, 2014 WL 6645251 at *4 (S.D.N.Y. Oct. 7, 2014) (memorandum of understanding); *Little*, 2005 WL 2429437, at *2 (mediation form). Given the ample precedent enforcing agreements resting on the initial writing alone, this factor seems to be satisfied. Once again, a clear statement by this Court that mediation agreements are sufficient commitments to writing to reflect a binding agreement, would be helpful precedent.

Issue 2: Did the district court err in finding that there was no duress when Murphy signed the mediation Agreement?

Recommendation: No. Because there was no undue pressure resulting from actions by the defendants, it is clear the circumstances surrounding the signing of the mediation agreement do not constitute duress.

"To void a contract based on duress, a party must show that wrongful conduct precluded the exercise of [that party's] free will." *Interpharm, Inc. v. Wells Fargo Bank, National Association,* 655 F.3d 136, 142 (2d Cir. 2011). In order to find duress in a contract dispute, the duress must originate from the defendant. *Mandavia v. Columbia Univ.*, 912 F. Supp. 2d 119, 127 (S.D.N.Y. 2012), *aff'd* , 556 Fed. Appx. 56 (2d Cir. 2014) (unpublished) ("Further, in a contract dispute like this one, the duress at issue must have originated from the defendant.").

Appellant argues that even if the *Winston* factors point to enforceability, the agreement shouldn't be enforceable as it was signed under duress. This claim holds no weight, primarily because Appellant makes no claim of duress against the defendant. **[A 107-08.]** Further, feelings of pressure, as displayed here, are not enough to constitute duress. *See Gaughan v. Rubenstein*, 261 F. Supp. 3d 390, 403 (S.D.N.Y. 2017) (finding no duress where plaintiff "felt pressured to sign the documents").

IV. Conclusion

For the foregoing reasons, I respectfully recommend that the Court AFFIRM the district court's decision but issue an opinion supporting the enforceable nature of preliminary agreements signed at mediation.

Applicant Details

First Name	**Stewart**
Last Name	**Rickert**
Citizenship Status	**U. S. Citizen**
Email Address	**sjr294@cornell.edu**
Address	**Address** Street **181 Amity Street** City **Brooklyn** State/Territory **New York** Zip **11201** Country **United States**
Contact Phone Number	**8123458850**

Applicant Education

BA/BS From	**Wake Forest University**
Date of BA/BS	**May 2016**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 15, 2022**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Cornell Law Review** **Supreme Court Bulletin**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Rossi Moot Court** **Langfan Family Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Gardner, Maggie
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Stewart James Rickert
105 Dewitt Place, Apartment 8
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March 1, 2022

The Honorable Lewis Liman
United States District Court for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Dear Judge Liman:

I am a third-year student at Cornell Law School ranked in the top 10% of my class writing to apply for a clerkship in your chambers for the 2024-2025 term. For the 2022-2023 term, I will clerk for Judge Steven Colloton on the U.S. Court of Appeals for the Eighth Circuit.

I am particularly interested in clerking for you because of your experience at the U.S. Attorney's Office for the Southern District of New York. I hope to one day serve as an Assistant U.S. Attorney, and I know clerking in your chambers would be invaluable to me. It was also a pleasure to argue before you for my Federal Appellate Practice course.

A résumé, transcript, law school grading policy, reference list, and writing sample are attached. Letters of recommendation from Cornell Law School professors Nelson Tebbe and Maggie Gardner and Assistant U.S. Attorney Sheb Swett will follow under separate cover.

Please do not hesitate to contact me at the above address or telephone number if you need any additional information. Thank you again for your consideration.

Respectfully,

Stewart Rickert

Stewart James Rickert

105 Dewitt Place, Apartment 8, Ithaca, NY 14850
sjr294@cornell.edu | 812.345.8850

EDUCATION

Cornell Law School, Ithaca, NY
Candidate for J.D., May 2022
GPA: 3.854 – Top 10% of class
Honors: Fraser Prize (awarded to two third-year students based on academic achievement)
Activities: Articles Editor, *Cornell Law Review*, Volume 107
Executive Editor, *Supreme Court Bulletin* (neutral previews of Supreme Court cases)
Finalist, Louis Kaiser Best Brief Competition, 2021 Rossi Moot Court Competition
Semi-Finalist, 2021 Cuccia Cup Moot Court Competition
Research Assistant, Professor Nelson Tebbe
Teaching Assistant, Professor George Hay and Professor Dawn Chutkow

Wake Forest University, Winston-Salem, NC
B.A., *magna cum laude*, in Economics and in Political Science, May 2016
Honors: Honors in Economics and in Political Science
Thesis: A Challenge to the Miller Hypothesis: New Evidence of the Municipal Bond Puzzle During the Build America Bonds Program

EXPERIENCE

Hon. Steven M. Colloton, U.S. Court of Appeals for the Eighth Circuit, Des Moines, IA 2022-2023
Law Clerk
Will clerk for Judge Colloton for the 2022-2023 term.

Kellogg, Hansen, Todd, Figel & Frederick, Washington, D.C. Summer 2022
Pre-Clerkship Summer Associate
Will work at Kellogg Hansen during the Summer of 2022.

Cravath, Swaine & Moore, New York, NY Summer 2021
Summer Associate
Drafted an expert report, corresponding rebuttal report, and defensive deposition outline for a confidential arbitration. Drafted a pro bono appellate brief.

United States Attorney's Office, Southern District of New York, New York, NY Summer 2020
Summer Intern, Criminal Division
Researched and drafted a Second Circuit brief and a § 2255 opposition motion. Researched relevant case law and wrote research memorandums in connection with on-going investigations by the Public Corruption Unit and the Securities and Commodities Fraud Task Force.

Keefe, Bruyette & Woods, Inc., San Francisco, CA 2017-2018
FBR Capital Markets & Co., New York, NY (acquired) 2016-2017
Investment Banking Analyst, Financial Institutions Group
Performed Excel modeling, created presentation materials, and drafted fairness opinions for two completed buy-side and three completed sell-side engagements. Received lateral offer from Keefe, Bruyette & Woods after FBR Capital Markets was acquired.

INTERESTS

Playing guitar and basketball, jogging, skiing, singing, and optimistically watching Wake Forest sports.

Cornell Law School - Grade Report - 01/21/2022

Stewart James Rickert

JD, Class of 2022

Course	Title	Instructor(s)	Credits	Grade
Fall 2019 (8/27/2019 - 12/23/2019)				
LAW 5001.3	Civil Procedure	Gardner	3.0	A-
LAW 5021.2	Constitutional Law	Tebbe	4.0	A
LAW 5041.2	Contracts	Hillman	4.0	A
LAW 5081.5	Lawyering	McKee	2.0	A-
LAW 5151.2	Torts	Heise	3.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.8350
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.8350

^ Dean's List

Spring 2020 (1/14/2020 - 5/11/2020)

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. Four law school courses were completed before mid-March and were unaffected by this change. Other units of Cornell University adopted other grading policies. Thus, letter grades other than S/U appear on some spring 2020 transcripts. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

LAW 5001.1	Civil Procedure	Cavanagh	3.0	SX
LAW 5061.3	Criminal Law	Ohlin	3.0	SX
LAW 5081.5	Lawyering	McKee	2.0	SX
LAW 5121.3	Property	Underkuffler	4.0	SX
LAW 6101.1	Antitrust Law	Hay	3.0	SX

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	0.0	0.0	N/A
Cumulative	31.0	31.0	31.0	31.0	16.0	16.0	3.8350

Fall 2020 (8/25/2020 - 11/24/2020)

LAW 6131.1	Business Organizations	Hockett	3.0	A-
LAW 6201.1	First Amendment: Speech and Press Clauses	Tebbe	3.0	A
LAW 6861.604	Supervised Teaching	Chutkow	2.0	SX
LAW 7052.101	Adv. Per. Writing and Oral Advocacy	Bryan	3.0	A-
LAW 7621.101	Issues in Poverty Law	Lasdon	3.0	A

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	12.0	12.0	3.8350
Cumulative	45.0	45.0	45.0	45.0	28.0	28.0	3.8350

^ Dean's List

Spring 2021 (2/8/2021 - 5/7/2021)

LAW 6011.1	Administrative Law	Rogers	3.0	A+
LAW 6192.101	Conflict of Laws Seminar	Richardson	3.0	A-
LAW 6201.1	First Amendment: Religion Clauses	Tebbe	3.0	A
LAW 6401.1	Evidence	Weyble	3.0	A-
LAW 6791.1	Public International Law	Richardson	3.0	A-

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	15.0	15.0	3.8680
Cumulative	60.0	60.0	60.0	60.0	43.0	43.0	3.8465

^ Dean's List

Fall 2021 (8/24/2021 - 12/3/2021)

LAW 6264.1	Criminal Procedure - Investigations	Margulies	3.0	A-
LAW 6641.1	Professional Responsibility	Wendel	3.0	A
LAW 6861.604	Supervised Teaching	Hay	2.0	S
LAW 6946.101	Race, Constitution and American Empire	Arnaud	3.0	A
LAW 7260.101	Federal Appellate Practice	Blume/Wesley	4.0	SX

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	0.0	0.0	9.0	9.0	3.8900
Cumulative	75.0	75.0	60.0	60.0	52.0	52.0	3.8540

^ Dean's List

Total Hours Earned: 75

Wake Forest University
Office of the University Registrar
PO Box 7207
Winston-Salem, NC 27109
Phone: 336-758-5207
Email:registrar@wfu.edu

Wake Forest University Official Transcript

Statement of Authenticity

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OFFICIAL TRANSCRIPT

WAKE FOREST UNIVERSITY
Office of the Registrar
P.O. Box 7207
Winston Salem NC 27109-7207

Student **Stewart James Rickert**

ID: 06388719 Birthdate: 03/21

Majors: Economics
Politics & Int'l Affairs

Minors:

Entry Date: 08/27/2012
Certificates and
Foreign Area Studies

Undergraduate Division

Date Printed 09-JUL-2017 Page: 1

Issued To: Stewart James Rickert
Parchment:14344011

Course Level: Undergraduate

Degrees Awarded Bachelor of Arts 16-MAY-2016
Ehrs: 120.00 GPA-Hrs: 108.00 QPts: 390.760 GPA: 3.618
Primary Degree
Major : Economics
Major : Politics & Int'l Affairs
Dept. Honors: With Honors in Economics
Honors in Pol & Int'l Affairs
Inst. Honors: Magna Cum Laude

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:						
Fall 2012		Advanced Placement Credit				
ENG	111	Writing Seminar	4.00	AP		
HST	150	United States History	3.00	AP		
Ehrs: 7.00 GPA-Hrs: 0.00 QPts: 0.000 GPA: 0.000						
INSTITUTION CREDIT:						
Fall 2012						
CLA	261	Greek Myth	3.00	B-	8.010	
ENG	210	Academic Research and Writing	3.00	A	12.000	
MTH	105L	Fundament Alg Trig Lab	1.00	P	0.000	
MTH	111	Calculus/ Analytic Geom I	4.00	C-	0.000	E
SOC	151	Principles of Sociology	3.00	B+	9.990	
Ehrs: 10.00 GPA-Hrs: 9.00 QPts: 30.000 GPA: 3.333						
Spring 2013						
FYS	100	Public Sexuality	3.00	B	9.000	
PHI	115	Intro to Phil of Religion	3.00	B+	9.990	
PHY	109	Astronomy	4.00	B	12.000	
POL	116	International Politics	3.00	A-	11.010	
Ehrs: 13.00 GPA-Hrs: 13.00 QPts: 42.000 GPA: 3.230						
Fall 2013						
ECN	150	Introduction to Economics	3.00	A	12.000	
HST	108	Americas and the World	3.00	A-	11.010	
POL	212	US Plcymkng in the 21st Cent	3.00	A	12.000	
POL	252	Top.Intl: Human Rights	3.00	A	12.000	I
SPN	111	Elementary Spanish	3.00	B	9.000	
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 56.010 GPA: 3.734						
*Dean's List						
Spring 2014						
ECN	205	Intermediate Microeconomics I	3.00	A	12.000	
HES	100	Lifestyles and Health	1.00	A	4.000	
MTH	109	Elementary Probability & Stats	4.00	A	16.000	
********** CONTINUED ON NEXT COLUMN **********						

SUBJ	NO.	COURSE TITLE	CRED	GRD	PTS	R
Institution Information continued:						
POL	114	Comparative Govt & Politics	3.00	A-	11.010	
SPN	112	Elementary Spanish	3.00	B	9.000	
Ehrs: 14.00 GPA-Hrs: 14.00 QPts: 52.010 GPA: 3.715						
*Dean's List						
Fall 2014						
ECN	223	Financial Markets	3.00	A	12.000	
ECN	271	Slct Areas ECN: Cambridg Trad	3.00	A	12.000	
ECN	272	Slctd Areas ECN Intl ECN Issue	3.00	A	12.000	
POL	252	Tps Intl Pol Geopolitics	3.00	A	12.000	I
POL	252	Topics in Intl Politics: BRICS	3.00	A-	11.010	I
Ehrs: 15.00 GPA-Hrs: 15.00 QPts: 59.010 GPA: 3.934						
*Dean's List						
Spring 2015						
ECN	207	Intermediate Macroeconomics	3.00	A-	11.010	
ECN	209	Applied Econometrics	3.00	A	12.000	
MTH	111	Calculus/ Analytic Geom I	4.00	A	16.000	I
MUS	101	Introduction to Western Music	3.00	A	12.000	
POL	291	Research Dsign & Qual Analysis	1.50	A	6.000	
POL	292	Quantitative Analysis	1.50	A	6.000	
Ehrs: 16.00 GPA-Hrs: 16.00 QPts: 63.010 GPA: 3.938						
*Dean's List						
Fall 2015						
ECN	206	Intermediate Microeconomics II	3.00	B-	8.010	
ECN	221	Public Finance	3.00	A-	11.010	
ECN	298	Economic Research	3.00	B+	9.990	
POL	253	Intl Political Economy	3.00	A-	11.010	
SPA	153	Intermediate Spanish	4.00	P	0.000	
Ehrs: 16.00 GPA-Hrs: 12.00 QPts: 40.020 GPA: 3.335						
Spring 2016						
ECN	252	International Finance	3.00	A	12.000	
HES	101	Exercise for Health	1.00	B	3.000	
POL	269	TopTheory:Environ.Pol.Thought	3.00	A-	11.010	
POL	300	Senior Seminar in Pol Science	4.00	A-	14.680	
SPA	212	Exploring the Hispanic World	3.00	B-	8.010	
Ehrs: 14.00 GPA-Hrs: 14.00 QPts: 48.700 GPA: 3.478						
*Dean's List						

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	113.00	108.00	390.760	3.618
TOTAL TRANSFER	7.00	0.00	0.000	0.000
OVERALL	120.00	108.00	390.760	3.618

********** END OF TRANSCRIPT **********

AN OFFICIAL SIGNATURE IS WHITE WITH AN OLD GOLD BACKGROUND

REJECT DOCUMENT IF SIGNATURE BELOW IS ALTERED

Harold L. Pace, Ph.D.
University Registrar

WAKE FOREST UNIVERSITY CEEB Code = 5885 FICE Code = 002978 Email: registrar@wfu.edu Website: registrar.wfu.edu Phone: (336) 758-5207 Fax: (336) 758-6056
For questions or further information, contact the University Registrar's Office at PO Box 7207, Winston-Salem, NC 27109. The University Registrar issues official transcripts for the Undergraduate, Graduate, Divinity and School of Business.

VALUE SYSTEM

From Fall 1975 to Summer 2001, the undergraduate school awarded course credits. Credits may be converted into conventional semester hours by multiplying the assigned credits by 0.9 (i.e., 4 credits = 3.6 semester hours). Students matriculating in the undergraduate schools beginning in Fall 2001 recieve semester hours. The Graduate and Divinity Schools award conventional semester hours.

After Fall of 1998, the undergraduate and graduate schools changed to a plus/minus grading scale. At that time, the Graduate School also changed from a 3.00 point scale to a 4.00 point scale. Graduate students who matriculated before Fall 1998 but were still enrolled as of Fall 1998 had all earlier grades converted to the 4.00 point scale.

TRANSFER CREDITS

Transfer credit may be counted toward the graduation requirements, but grades earned in the transfer course are not used in calculating the Wake Forest grade point average. The grades appearing on the Wake Forest transcript are the actual grades earned, but the units shown are only those accepted for transfer by Wake Forest.

Departmental abbreviations are listed in the Bulletins. Some courses transferred from other institutions may have abbreviations not found in the Bulletin.

Repeated courses are flagged I (included in GPA) or E (excluded in GPA). For classes taken and repeated at Wake Forest, only one grade remains in the cumulative grade point average, based on Bulletin regulations.

DEFINITION OF GRADES AND GRADE POINT VALUES

UNDERGRADUATE

Calculated in grade point average:

Grade	Definition	Points
A	Exceptionally high achievement	4.00
A-		3.67
B+		3.33
B	Superior	3.00
B-		2.67
C+		2.33
C	Satisfactory	2.00
C-		1.67
D+		1.33
D		1.00
D-	Passing but unsatisfactory	.67
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00
WF	Withdrawn failing	.00

Not calculated in grade point average:

EX	Exemption
P	Passing
FPF	Failure in Pass/Fail grade mode
IPF	Incomplete in Pass/Fail grade mode
NRPF	Not reported in Pass/Fail grade mode
AU	Audit
DR	Official drop approved by the Dean
NC	Non-credit non-grade course
WD	Withdrawal from the University
(grade) N	Course not approved for Transfer
T (grade)	Transfer credit

GRADUATE

Starting with the fall 1997 semester, graduate level courses changed from 300, 400, and 500 level courses to the current 600, 700, and 800 level courses.

System prior to Summer 1998

Calculated in grade point average:

Grade	Points per Hour
A	3.00
B	2.00
C	1.00
F	0.00

Not calculated in grade point average:

Grade	Definition
P	Passing
F	Failure in Pass/Fail mode
NR	Not reported in Satisfactory/Unsatisfactory mode
I	Incomplete in Satisfactory/Unsatisfactory mode
S	Satisfactory
U	Unsatisfactory
AUD	Audit
DRP	Drop approved by the Dean after regular drop period
NC	Non-credit non-graded course
W	Withdrawal from the University
WP	Withdraw Passing
WF	Withdraw Failing

System after summer 1998

Calculated in grade point average:

Grade	Definition	Points
A	Excellent	4.00
A-		3.67
B+		3.33
B	Good	3.00
B-		2.67
C+		2.33
C	Low Passing	2.00
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00
WF	Withdrawn failing	.00

Not calculated in grade point average:

I	Incomplete in Satisfactory/ Unsatisfactory grade mode
P	Passing
FPF	Failure in Pass/Fail grade mode
IPF	Incomplete in Pass/Fail grade mode
NRPF	Not reported in Pass/Fail grade mode
NR	Not reported in Satisfactory/ Unsatisfactory grade mode
S	Satisfactory
U	Unsatisfactory
AU	Audit
DR	Official drop approved by the Dean
NC	Non-credit non-grade course
WD	Withdrawal from the University

DIVINITY

Calculated in grade point average:

Grade	Definition	Points
A	Excellent	4.00
A-		3.67
B+		3.33
B	Commendable	3.00
B-		2.67
C+		2.33
C	Satisfactory	2.00
C-		1.67
D	Unsatisfactory	.00
F	Failure	.00
I	Incomplete	.00
NR	Grade not reported	.00
WF	Withdrawn failing	.00

Not calculated in grade point average:

P	Passing
FPF	Failure in Pass/Fail grade mode
IPF	Incomplete in Pass/Fail grade mode
NRPF	Not reported in Pass/Fail grade mode
AU	Audit
DR	Official drop approved by the Dean
WD	Withdrawal from the University

SCHOOL OF BUSINESS (Professional)

Students who began the program prior to July 2009, are graded on a 9-point grading system. Students admitted after that date are graded on a 4-point grading system.

Calculated in grade point average:

4-point grading system

Grade	Points
A	4.00
A-	3.67
B+	3.33
B	3.00
B-	2.67
C+	2.33
C	2.00
C-	1.67
D	.00
F	.00

Not calculated in grade point average:

Grade	Definition
I	Incomplete
P	Pass/Fail course
AU	Audit
WD	Withdrawn from the University
WP	Withdrawn passing from a course
WF	Withdrawn failing from a course
E	Exempt from a course
T	Course transfer
X	Course wavied

9-point grading system

Grade	Points
A+	9
A	8
A-	7
B+	6
B	5
B-	4
C+	3
C	2
C-	1
F	0

Cornell University
Law School

Lawyers in the Best Sense

January 2022

Cornell Law School Grading Policy for JD Students
Faculty grading policy calls upon each faculty member to grade a course, including problem courses and seminars, so that the mean grade for JD students in the course approximates 3.35 (the acceptable range between 3.2 and 3.5). This policy is subject only to very limited exceptions. †

Class Rank
As a matter of faculty policy we do not release the academic rankings of our students. Interested individuals, including employers, have access to the top 10% approximate cumulative grade point cut off for the most recent semester of completion. In addition, at the completion of the students second semester and every semester thereafter the top 5% approximate cumulative grade point average is also available. In general students are not ranked however the top ten students in each class are ranked and are notified of their rank.

Class of 2022 [five semesters]:
5% - 3.8722 10% - 3.8339
Class of 2023 [three semesters]:
5% - 3.9150 10% - 3.8360
Class of 2024 [one semester]:
10% - 3.8337

Dean's List
Each semester all students whose **semester** grade point average places them in the top 30% of their class are awarded Dean's List status. Students are notified of this honor by a letter from the Dean and a notation on their official and unofficial transcripts.

Myron Taylor Scholar
This honor recognizes students whose cumulative MPR places them in the top 30 percent of their class at the completion of their second year of law school. Students are notified of this honor by a letter from the Dean of Students and a notation on their transcripts.

Academic Honors at Graduation
The faculty awards academic honors at graduation as follows: The faculty awards the J.D. degree summa cum laude by special vote in cases of exceptional performance. The school awards the J.D. degree magna cum laude to students who rank in the top 10% of the graduating class. Students who rank in the top 30% of the class receive the J.D. degree cum laude unless they are receiving another honors degree. For the graduating Class of 2021, the gpa cut off for magna cum laude was 3.8318 and for cum laude was 3.6542. Recipients are notified by a letter from the Dean and a notation on their official and unofficial transcripts.

The Order of the Coif is granted to those who rank in the top 10% of the graduating class. To be eligible for consideration for the Order of the Coif, a graduate must take 63 graded credits at Cornell Law. (The Order of the Coif is a National Organization that sets its own rules.)

† Prior to fall 2018, faculty who announced to their classes that they might exceed the cap were free to do so. If the 3.5 cap was exceeded in any class pursuant to such announcement, the transcript of every student in the class will carry an asterisk (*) next to the grade for that class, and for various internal purposes such as the awarding of academic honors at graduation, the numerical impact of such grades will be adjusted to be the same as it would have been if the course had been graded to achieve a 3.35 mean.

For detailed information about exceptions and other information such as grading policy for exchange students please go to the Exam Information & Grading Policies link at http://www.lawschool.cornell.edu/registrar/.

Stewart James Rickert
105 Dewitt Place, Apartment 8, Ithaca, NY 14850
sjr294@cornell.edu | 812.345.8850

REFERENCES

The Honorable Richard C. Wesley, Senior Judge, U.S. Court of Appeals for the Second Circuit
500 Pearl Street, New York, NY 10007
Telephone: (585) 243-7910
Email: rcw64@cornell.edu

Nelson Tebbe, Jane M.G. Foster Professor of Law, Cornell Law School
202 Myron Taylor Hall, Ithaca, NY 14853
Telephone: (607) 255-0111
Email: nt277@cornell.edu

Maggie Gardner, Associate Professor of Law, Cornell Law School
233 Hughes Hall, Ithaca, NY 14853
Telephone: (607) 255-5346
Email: mg2354@cornell.edu

Sheb Swett, Assistant U.S. Attorney, U.S. Attorney's Office for the Southern District of New York
1 Saint Andrews Plaza, New York, NY 10007
Telephone: (646) 832-8041
Email: sswett@usa.doj.gov

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I write to recommend Stewart Rickert to you as a law clerk for your chambers. Stewart has a quick and inquisitive analytical mind and a professional maturity. He has all the makings of being a talented law clerk.

Stewart, who was a student in my first-semester civil procedure class, is the type of student that law professors love. Without dominating conversations, Stewart offered high quality comments and connections on a weekly basis. It was clear that these insights reflected not only his deep understanding of the material, but also his sensitivity to the social context of the law. To cite just a few examples, Stewart noted the tension between Iqbal's acceptance of racial profiling and the Court's insistence on color-blindness in affirmative action cases; could see the systemic effects of altering discovery rules for other areas of procedure (like class actions); and queried whether outvoted jurors could argue that non-unanimity statutes violated their equal protection rights. I quickly learned I could rely on Stewart to help clarify the most challenging cases and doctrines through Socratic dialogue. I anticipate you will find him an engaging and constructive interlocutor on challenging legal questions.

In addition to his analytical ability and curiosity, Stewart understands how to write clearly and concisely. I was particularly impressed by his essay on our final exam, which not only identified and analyzed all issues correctly, but did so with a well-organized, concise and fluid writing style that was a pleasure to read. Finally, Stewart seems to approach his law school career with a mature professionalism—always prepared, always polite, always eager to do and learn more. That combination of skills (analytical, verbal, and interpersonal) helps explain his highly successful law school career and will make him a strong asset for your chambers team.

I would be happy to speak further about Stewart if I can be of any additional assistance. You can always reach me by email at mgardner@cornell.edu or on my mobile at (202) 413-0716.

Sincerely,

Maggie Gardner
Assistant Professor of Law

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

Stewart Rickert has my strongest possible recommendation for a clerkship in your chambers. Stewart has been an outstanding student and an excellent research assistant. I aim to do everything I can to ensure that he is matched with a wonderful judge who can benefit, as I have, from his meticulous work and unfailing good cheer.

Stewart was assigned to my constitutional law course in his first term of law school. He made a memorable impression with his consistent preparedness, solid analysis, and calm but friendly demeanor. Unsurprisingly, to me at least, he performed beautifully on the examination, earning an impressive A for the course. No student received a higher grade that term.

After the course ended, when I was looking for research assistants for the summer, Stewart came quickly to mind. I was just beginning a large empirical project, together with a scholar at Hebrew University. We wanted to know whether the application of antidiscrimination laws to child placement agencies had an impact on the welfare of children. Our attention had been drawn to the issue by Fulton v. City of Philadelphia, which the Justices had just agreed to hear. There, the Catholic agency was arguing that if it was forced to serve same-sex couples, it would close its doors and that would harm children. On the other side, the city was arguing that allowing the agency to exclude same-sex couples was harming kids. Yet there was no reliable study on that question. We thought that was odd, because this had happened before—similar conflicts had flared up, resulting in the closure of some agencies. So we set out to study whether children had been affected.

Stewart has been absolutely instrumental in our research. At the very beginning, he helped us to compile a comprehensive database of state laws governing discrimination by child placement agencies—either prohibiting or protecting it as an exercise of religious freedom. Assembling that information turned out to be a real challenge, because many state rules are contained not in statutes but in court decisions or administrative regulations. He meticulously tracked down and sourced the governing law in every state in a detailed database.

Because we sought to measure the correlation between state antidiscrimination law and child outcomes, we needed to be absolutely certain that the information in the database was accurate—not just the current law of each state, but also when it was first enacted. Stewart's citation system gave us that confidence. This past January, Stewart's work was tested when we presented some of our research at a conference at UVA Law School. When another scholar presented a similar database that purported to represent the same state laws, but that differed in some respects from ours, we were momentarily concerned. But when we subsequently met with that scholar, along with Stewart, it became clear that our data was solid—and actually superior in virtually every instance where there was a disparity. And that was thanks to Stewart.

In subsequent phases of the project, Stewart has proven just as thorough, perceptive, and reliable. For example, we then built another database, this time tracking actual conflicts between governments and religious child welfare agencies. That database was built by Stewart, working together with one or two other students. They began by researching litigation disputes, and they supplemented those with a search of newspapers and online reports. That search picked up disputes that did not result in litigation, but it also served to cross-check the litigation database that Stewart had constructed. It revealed no flaws.

In short, Stewart has been one of the ablest research assistants that I have ever worked with over the course of my career. Although he has not yet produced a piece of formal legal writing, I am certain that his legal research skills, his discerning mind, and his work ethic will translate seamlessly to more traditional legal writing.

In the meantime, Stewart has continued to take classes with me. Last term, he was a student in my course on freedom of speech and the press, where he performed at his typically high level of excellence. And in this current term, he is a student in my course on the religion clauses of the Constitution. Recently, in fact, he was part of the on-call panel and he engaged with me in a thorough examination of Marsh v. Chambers, the legislative prayer case. It was an impressive performance.

In case it is not already obvious, I have grown fond of Stewart through these many experiences and interactions. I am grateful for his hard work—it's true—but I also genuinely like and respect him on a personal level. While I am grateful that our first semester together predated Covid and was in person, I have also enjoyed interacting with him over Zoom and I have not found that medium to be unnatural for him. A fun wrinkle is that one of the places Stewart has been spending time during the pandemic, aside from his parents' home in Indiana, is just a few blocks away from where I live in Brooklyn. Once or twice, I have run into him on the street which has been an unexpected pleasure.

In sum, I believe that Stewart will make an exceptional law clerk and that he will be a delight to work with in chambers. I urge you to interview him and, assuming you share my high opinion, to hire him. Please feel free to contact me with any questions—I would be delighted to discuss him further. My cell number is 347-525-3788.

Nelson Tebbe - nt277@cornell.edu - (607) 255-7193

Respectfully,

Nelson Tebbe
Jane M.G. Foster Professor of Law

Nelson Tebbe - nt277@cornell.edu - (607) 255-7193

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

March 2, 2022

The Honorable Lewis J. Liman
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write to recommend Stewart Rickert for a clerkship position in Your Honor's chambers. I was Stewart's mentor during his internship at the U.S. Attorney's Office in the Southern District of New York last summer. In this role, I had the opportunity to supervise his work and discuss his goals for his legal career. Having gotten to know him, I have no doubt that he will thrive as a clerk.

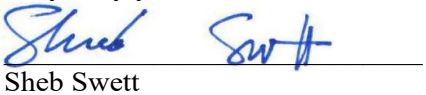
Stewart quickly demonstrated his ability to produce high-quality research and writing. I asked him to write the first draft of an appellate brief in which two defendants appealed their sentences. The appeal required both careful review of the record to support the district court's conclusions, as well as legal argument about the meaning of a Guidelines provision that the Second Circuit had not yet interpreted. Stewart turned in a draft ahead of schedule that was clear, comprehensive, and persuasive. He canvassed the relevant Second Circuit cases, but also identified helpful cases from out of circuit to supplement the limited Second Circuit caselaw. His writing, in particular, stood out as far beyond what I typically see from a summer intern. On this and other projects, Stewart more than exceeded my expectations.

I spoke with Stewart on several occasions both about my experiences as an AUSA and his own career aspirations, and I was always struck by his desire to serve the public with his legal training. Stewart has a thoughtful, humble attitude about the responsibilities attorneys have to the profession and to society at large. This attitude will undoubtedly serve him well as a clerk, and the opportunity to see the profession from a judge's perspective will further develop him into the outstanding lawyer I know he will be.

Our office was closed last summer, so the internship program lacked many of the typical social outings that make up a large part of the interns' experience. Still, even though Stewart and I only connected remotely, he was easy to work with and even easier to get along with. I know that each clerkship group can develop into something like a family, and Stewart will feel right at home in that setting.

For these reasons and more, I recommend Stewart for a clerkship. If you have any other questions, I hope you will call me without hesitation.

Very truly yours,



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WRITING SAMPLE

This writing sample is an appellate brief I wrote during my summer internship at the U.S. Attorney's Office for the Southern District of New York (the "USAO"). In this brief, the USAO opposes two sentencing appeals filed by Ferney Salas Torres ("Torres") and Saul Calonjes Salas ("Salas"). Following guilty pleas, Judge Richard Sullivan—then a U.S. District Judge in the Southern District of New York—sentenced Torres and Salas to twenty and fifteen years' of imprisonment, respectively. This brief argues their sentences were procedurally and substantively reasonable.

The complete brief I submitted was 40 pages long. For brevity's sake, I include here only the procedural reasonableness discussion and the factual background necessary for that section. Specifically, the argument I include below is that Judge Sullivan did not err in denying a minor role adjustment and applying a pilot enhancement when calculating Torres's and Salas's applicable Guidelines sentencing ranges. I wrote and edited this sample alone, and the USAO has approved my use of this brief as a sample of my writing.

STATEMENT OF FACTS

A. The Offense Conduct

On March 17, 2018, while patrolling southwest of Panama, a U.S. Coast Guard boat identified a small, high-speed boat—a "go-fast" boat —heading north at approximately 30 knots. (PSR ¶ 11).[1] The Coast Guard observed two individuals, later identified as Saul Calonjes Salas and Heyder Renteria Solis, throwing packages overboard while a third individual, later identified as Ferney Salas Torres, steered the go-fast boat. (*Id*. ¶ 12). A few minutes later, the go-fast boat stopped, and Torres, Salas, and Solis submitted to Coast Guard authority. (*Id*. ¶ 13). The Coast Guard recovered thirty-four packages from the go-fast boat and the surrounding water containing 945 kilograms of cocaine and approximately 10 kilograms of amphetamine. (*Id*. ¶ 14).

B. Torres's and Salas's Plea Agreements and Guilty Pleas

In February 2019, Torres and Salas pleaded guilty before Judge Sullivan to conspiracy to manufacture, distribute or possess a controlled substance on a vessel, in violation of 46 U.S.C. §§70506, 70504(b)(2) and 21 U.S.C. §960(b)(2)(B), pursuant to a plea agreement with the Government. (Torres A. 18). The parties agreed that under the United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") Section 2D1.1(c)(1), the base offense level attributable to both defendant's conduct was 38, because both of their offenses involved at least 450 kilograms of cocaine. (Torres A. 19). Torres's and Salas's Plea Agreements stipulated that each were minor participants in the offense under U.S.S.G. § 3B1.2, reducing their offense levels by four points pursuant to U.S.S.G. § 2D1.1(a)(5)(iii) and by two points per U.S.S.G. § 3B1.2. (*Id*.). Both plea agreements also stipulated a three-point reduction for acceptance of

[1] "[Name] Br." refers to the named defendant's brief; "[Name] A." refers to the appendix filed with the defendant's brief; "[Name] PSR" refers to the Presentence Investigation Report prepared by the United States Probation Office.

responsibility was warranted under U.S.S.G. §§ 3E1.1(a) and 3E1.1(b), resulting in a total offensive level of 29 for both defendants. (*Id*.)

Torres had a criminal history category of III, resulting in a Guidelines Range of 108 to 135 months' imprisonment. (Torres A. 20). Salas had a criminal history category of II, resulting in a Guidelines Range of 98 to 121 months' imprisonment. (Salas A. 20).

C. The *Fatico* Hearing

On August 28, 2019, the District Court held a *Fatico* hearing to determine whether Torres or Salas qualified for either a minor role adjustment pursuant to U.S.S.G. § 3B1.2(b) or a pilot enhancement pursuant to U.S.S.G. § 2D1.1(b)(3). (Torres A. 153). At the hearing, the Government's only witness was Special Agent Ronald Sandoval ("Sandoval") of the Drug Enforcement Agency ("DEA"). He testified based on his five years of experience at the DEA office in Colombia, his debriefings of more than 70 mariners who had trafficked drugs on go-fast boats, his involvement in the investigation of Torres and Salas, and his participation in interviews with Torres and Salas. (Torres A. 157-60).

Sandoval testified that mariners are typically fishermen recruited from fishing villages because they are familiar with navigating boats on the open ocean. (Torres A. 177). The drug shipment's financers provide mariners with a boat and a global positioning system ("GPS"). (Torres A. 180). While the mariners know that the boat is loaded with narcotics, they do not package the narcotics, decide the size of the load to transport, or load the boat. (Torres A. 181). The mariners are then given GPS coordinates and a route, and they transport the narcotics to those coordinates following the route they are given; once they reach those coordinates, they transfer the narcotics to another boat. (Torres A. 189). The transfer can occur up to 600 miles off the coast of Mexico or Guatemala. (Torres A. 178).

Sandoval identified three typical roles on a go-fast boat: captain, navigator, and mechanic. (Torres A. 189). The captain of the boat has the closest relationship with the drug traffickers and is given the most responsibility for transporting the load. (Torres A. 216, 221). The navigator handles the GPS equipment and fills the captain's role if something happens to the captain. (Torres A. 231). The mechanic handles any issues with the engine. (Torres A. 231). Sandoval testified that, regardless of role, all members of the go-fast boat assist with all tasks, including steering the boat, because they "are usually seasoned mariners." (Torres A. 231). Sandoval further stated, however, that mariners are "easily replaceable." (Torres A. 196).

On average for a one-week trip, a captain earns approximately $50,000 and a mechanic earns approximately $40,000; in comparison, a fisherman in Colombia earns about $4,000 a year. (Torres A. 183). Sandoval explained that sometimes mariners are targeted for kidnapping or extortion because of the substantial amount of money they make for their work. (Torres A. 209). Because mariners make so much money, some choose to "retire" after one trip. (Torres A. 252).

Sandoval testified he became involved in the case against Torres and Salas when he learned through a wire intercept that a load of cocaine was moving by boat to Costa Rica. (Torres A. 197-99). He identified Torres as the primary steerer and the captain of the boat, and he did not specify what Salas's role was. (Torres A. 243-45). Torres and Salas seemed like "typical mariner[s]" with "very little education." (Torres A. 204). Sandoval testified Torres and Salas were each paid $45,000 per load, a typical amount for transporting narcotics by go-fast boat. (Torres A. 182, 206). Moreover, Sandoval explained that Torres's and Salas's previous criminal conduct was not uncommon, and he encountered a "lot of . . . repeat offenders." (Torres A. 202).

D. Torres's Sentencing

Judge Sullivan held a sentencing proceeding for Torres on December 10, 2019. Because the offense involved more than 450 kilograms of cocaine, Judge Sullivan determined Torres's base offense level was 38. (Torres A. 295). The District Court then turned to the question of whether a minor role adjustment was warranted under U.S.S.G. § 3B1.2(b). After hearing from the parties, Judge Sullivan stated he was "not persuaded that [Torres] is a minor participant in this offense." (Torres A. 304). In so finding, he stressed that Torres "got paid for this one trip which was about a week, which was 45 or $50,000, or seven to 10 times the salary of a Colombian police officer." (Torres A. 304). Judge Sullivan also relied on the "importance of this role and the necessity of this function," and the fact that Torres was "in communication with the folks who were the ones responsible for getting it to the next phase, the next link in this chain." (Torres A. 304). Judge Sullivan emphasized that this was "not his first time doing it" and he was a "[r]epeat player." (Torres A. 304). He concluded that it was not a "close call." (Torres A. 304).

Judge Sullivan next considered whether to impose a two-point enhancement under U.S.S.G. § 2D1.1(b)(3)(C) for being a "pilot." (Torres A. 305). He determined that the enhancement applied, based on the amount of skill required to transport large loads of cocaine on the open ocean and then "rendezvous midocean" with "tiny boats where a ton of cocaine is going to be off loaded." (Torres A. 305). Judge Sullivan explained that skill is required because it involves a "long time at sea and hundreds of miles out into the open ocean," which is "not simply the ability to work on a phone or GPS." (Torres A. 305). The Government agreed that the enhancement was warranted, but Torres opposed it. (Torres A. 305). Based on his calculation of the Guidelines, Judge Sullivan determined that the applicable offense level was 37.

(Torres A. 311). Given Torres was in Criminal History Category III, Judge Sullivan calculated a Guidelines range of 262 to 327 months' imprisonment. (Torres A. 312).

E. Salas's Sentencing

Judge Sullivan held a sentencing proceeding for Salas on December 12, 2019. Because the offense involved more than 450 kilograms of cocaine, Judge Sullivan determined that Salas's base offense level was 38. (Salas A. 261). Judge Sullivan then determined that Salas was not a minor participant in the offense. (Salas A. at 275-78). Since Judge Sullivan had already determined that Torres was not a minor participant, he focused on any differences between Salas's and Torres's conduct. (Salas A. at 261). Judge Sullivan stated that Torres was the "captain," which "connotes greater responsibility" (Salas A. 261), but he determined that Salas too was not a minor participant, principally because: (1) "both the defendant and [Torres] were to receive the same amount, $45,000," suggesting "that there is a lot of similarity between what they were doing" (Salas A. 261), and that Salas would "benefit considerably" (Salas A. 276); (2) they "both were responsible at various times for directing and navigating the boat" (Salas A. 261) and their roles were "fairly interchangeable" (Salas A. 268); (3) their role in the conspiracy "required a real special skill" with "enough decision- making authority to know when to jettison drugs and when not [to] jettison drugs"; and (4) Salas knew the "scope and structure" of the conspiracy and his role within it, getting the narcotics "from Point A to Point B." (Salas A. 276).

Judge Sullivan determined that Salas qualified as a "pilot" under U.S.S.G. § 2D1.1(b)(3), warranting a two-point enhancement. (Salas A. at 277, 286). Judge Sullivan observed that "it took and required experienced mariners who know how to navigate or pilot a boat . . . on the open ocean." (Salas A. 278). Moreover, the "fact that there are three on this boat is reflective of the need to have people with skills who can relieve each other during what is a long and

continuous voyage." (Salas A. 278). Defense counsel argued that Salas was not the captain of the boat, and that, at best, Salas "maybe . . . held the wheel for a period of time." (Salas A. 278). In light of Sandoval's testimony that there are three typical roles on a go-fast boat—pilot, navigator, and mechanic—but each member of the boat steers at times, the evidence Torres was the boat's pilot and Solis its mechanic, and the amount of money Salas was paid, Judge Sullivan determined that it could be inferred that Salas was the boat's navigator. (Salas A. 280-86). Based on his calculation of the Guidelines, including Salas's acceptance of responsibility, Judge Sullivan determined that the applicable offense level was 37. (Salas A. 286). Since Salas was in Criminal History Category II, Judge Sullivan calculated a Guidelines range of 235 to 293 months' imprisonment. (Salas A. 286-88).

TORRES'S AND SALAS'S SENTENCES WERE PROCEDURALLY REASONABLE

A. The District Court Properly Denied Minor Role Adjustments

Torres and Salas argue that the District Court erroneously denied them a minor-role reduction under the Guidelines. But the District Court did not err, let alone clearly err, in finding that Torres and Salas failed to demonstrate that the minor-role reduction should apply. In rejecting the minor-role reduction, Judge Sullivan thoroughly analyzed the relevant factors and found that most of them weighed against a minor-role reduction.

The determination of whether to apply a minor-role reduction is "based on the totality of the circumstances" and is "heavily dependent upon the facts of the particular case." U.S.S.G. § 3B1.2 cmt. n.3(C). Relevant factors include:

(1) the degree to which the defendant understood the scope and structure of the criminal activity;

(2) the degree to which the defendant participated in planning or organizing the criminal activity;

(3) the degree to which the defendant exercised decision-making authority or influenced the exercise of decision-making authority;

(4) the nature and extent of the defendant's participation in the commission of the criminal activity, including the acts the defendant performed and the responsibility and discretion the defendant had in performing those acts;

(5) the degree to which the defendant stood to benefit from the criminal activity.

U.S.S.G. § 3B1.2 cmt. n.3(C).

First, Judge Sullivan appropriately determined that the first factor under the Guidelines—the degree to which the defendants understood the scope and structure of the conspiracy—weighed against a minor role reduction. Both Torres and Salas knew that the go-fast boat was loaded with large quantities of narcotics and understood that their role was to get narcotics "from Point A to B." (Salas A. 276-77). That knowledge was further established by the fact that Torres and Salas were both repeat players who had been convicted for this offense in the past. (Torres A. 304). Further, Torres was in communication with other members of the trafficking operation. (Torres A. 304). Torres and Salas argue here, as they did below, that there were other conspiracy members with greater responsibilities. (Torres Br. 25; Salas Br. 27). Judge Sullivan acknowledged this fact (Salas A. 276) but gave that fact less weight than others. That was not clear error. This Court has repeatedly emphasized that a minor-role reduction "will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant's conduct must be 'minor'. . . as compared to the average

participant in such a crime." *Carpenter*, 252 F.3d at 235 (quoting *United States v. Rahman*, 189 F.3d 88, 159 (2d Cir. 1999)). Here, Judge Sullivan properly determined that Torres and Salas were more culpable than the typical low-level narcotics trafficker.

Second, Judge Sullivan appropriately found the fourth factor under the Guidelines—the nature and extent of the Torres's and Salas's participation in the commission of the criminal activity—weighed against a minor-role reduction. The District Court found that Torres and Salas played important and indispensable roles in the conspiracy, without which large quantities of cocaine could not make it to the United States. (Torres A. 304). Torres and Salas emphasize that amendments to the Guidelines clarify that the "fact that a defendant performs an essential or indispensable role in the criminal activity is not determinative." (Torres Br. 26 (quoting U.S.S.G. § 3B1.2 cmt. n.3(C)); Salas Br. 27). But such a fact undoubtedly weighs against the minor-role reduction, and Judge Sullivan identified several other relevant factors, including that driving the go-fast boat to its destination required "a real special skill" and "enough decision-making authority to know when to jettison drugs and when not [to] jettison drugs." (Salas A. 277).

Finally, Judge Sullivan properly determined that the fifth factor under the Guidelines—the degree to which Torres and Salas stood to benefit from the criminal activity—weighed against a minor-role reduction because both Torres and Salas were paid $45,000 per trip. (Torres A. 304; Salas A. 276). Torres and Salas argue that their lack of a proprietary interest in the large cocaine shipment weighs in their favor. (Torres Br. 25- 26; Salas Br. 25 (citing U.S.S.G. § 3B1.2 cmt. n.3(c))). The District Court, however, considered that argument at sentencing (Salas A. 267), and found that it was outweighed by the fact that "$45,000 for a week's work is . . . a lot of money. That degree of benefit I think is reflective of the role." (Salas A. 276). Not only is

that a substantial amount of money in objective terms, but it is particularly so in Colombia, where, as Judge Sullivan observed, the amount the defendants earned in one week is "seven to ten times the salary of a Colombian police officer." (Torres A. 304).

B. The District Court Properly Applied Pilot Enhancements

Torres and Salas also argue that Judge Sullivan erroneously determined they were the respective "pilot" and "navigator" of the go-fast boat pursuant to U.S.S.G. §2D1.1(b)(3). (Torres Br. 29-36; Salas Br. 29-37). That is not so. Section 2D1.1(b)(3) provides for a two-point enhancement where the defendant "unlawfully imported or exported a controlled substance under circumstances" in which the defendant "acted as a pilot, copilot, captain, navigator . . . or any other operation officer aboard any craft or vessel carrying a controlled substance."

In appealing Judge Sullivan's application of this enchantment, Torres and Salas raise essentially the same argument. Torres and Salas appear to concede that by steering the go-fast boat they piloted and navigated it within the plain and ordinary meaning of the terms. (Torres. Br. 32-33; Salas Br. 35); *see United States v. Guerrero,* 114 F.3d 332, 346 (1st Cir. 1997) ("[T]he common dictionary definition of 'pilot' includes a person hired to steer a vessel"). But both defendants claim Judge Sullivan erred when he used the plain and ordinary meaning of "pilot" and "navigator," and instead, he should have used the "nautical" meaning of the terms, which would require a showing of a special skill set. (Torres Br. 34; Salas Br. 35). They then contend Judge Sullivan erred when he determined Torres and Salas possessed that special skill set. (Torres Br. 34; Salas Br. 35). That argument should be rejected.

Although this Court has yet to interpret this provision of the Guidelines, numerous circuits have held that the terms in Section 2D1.1b(3)(C) are to be given their ordinary meaning, which does not require any special skills. For example, in *United States v. Senn*, 129 F.3d 886

(7th Cir. 1997), the Seventh Circuit rejected the argument that 2D1.1(b)(3)(C) required special navigational skills: "The use of 'acted as' [pilot, etc.] suggests that we should look at conduct and not just at training or licensure. In the end, therefore, the plain language of the statute carries the day. Because the section states that it applies whenever the defendant 'acted as' a captain or navigator, we do not read [the statute] to require proof of special skill." *Id*. at 896-97; *see also United States v. Cruz-Mendez*, 811 F.3d 1172, 1175 (9th Cir. 2016) (the term pilot does not require proof of any special skill or authority); *United States v. Bautista-Montelongo*, 618 F.3d 464, 466 (5th Cir. 2010) (same). The facts here closely resemble those in *United States v. Trinidad*, 839 F.3d 112, 115 (1st Cir. 2016), where the First Circuit affirmed the district court's determination that the defendant—an experienced fisherman who followed a GPS with preset coordinates—acted as a navigator pursuant to 2D1.1(b)(3)(C).

Were a showing of special skills required, the District Court properly concluded the enhancement applies because Torres and Salas possessed that special skill set. Judge Sullivan found that the offense "required experienced mariners who know how to navigate or pilot a boat . . . on the open ocean." (Salas A. 278). He determined that special skill was required to transport loads of cocaine on the open ocean and then "rendezvous mid-ocean" with "tiny boats where a ton of cocaine is going to be off loaded." (Torres A. 305). Similarly, Judge Sullivan concluded that the amount of money each earned for the one-week trip implied Torres and Salas possessed valuable skills. (Salas A. 281). On appeal, Torres argues "having the course set on the GPS and simply following the arrow pointing in the appropriate direction is not navigation that requires a special skill set." (Torres Br. 34). He fails to address, however, Judge Sullivan's finding "[t]here is more to it than that," because the job "requires a long time at sea and hundreds of miles out in the open ocean." (Torres A. 305). This conclusion was rooted in Sandoval's

testimony that they "have to be. . . seasoned mariners . . . if you learned to drive a boat last week, it would be a daunting task to go to Central America on a boat." (Torres A. 217). As Judge Sullivan inferred, the "fact that there are three on this boat is reflective of the need to have people with skills who relieve each other during what is a long and continuous journey." (Salas A. 278).

Salas contends that "no facts at all in the record show that [he] was the navigator in this particular case." (Salas Br. 36). But ample evidence existed in the record to support Judge Sullivan's finding Salas navigated the boat. Sandoval testified to the three general roles on a go-fast boat: pilot, navigator, and mechanic. (Salas A. 284). The evidence showed that Torres was the pilot and Solis was the mechanic; thus, coupled with the fact Salas and Torres were paid the same amount and Salas's prior experience transporting narcotics at sea, Judge Sullivan reasonably inferred that Salas served the boat's remaining role—the navigator. On appeal, defense counsel proposed alternative theories regarding Salas's role, but the availability of an alternative theory does not make Judge Sullivan's inference clearly erroneous. *See United States v. Ulbricht*, 858 F.3d 71, 124 (2d Cir. 2017) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

Applicant Details

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Applicant Education

BA/BS From	**Williams College**
Date of BA/BS	**June 2017**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 18, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

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Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
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Dear Judge Liman:

I am a third-year student at the New York University School of Law, where I have been recognized as a Florence Allen Scholar for being in the top ten percent of my class after four semesters. I also serve as a Senior Executive Editor of the *New York University Law Review*. Following graduation, I will be working as a litigation associate at Sullivan & Cromwell LLP. I am writing to apply for a clerkship in your chambers for the 2024 term or any subsequent term.

I am enclosing my resume, law school transcript, undergraduate transcript, and writing sample. My writing sample is my Note, which will be published in the October 2022 issue of the *New York University Law Review*.

You will also be receiving letters of recommendation from Dean Trevor Morrison and Professors Emma Kaufman and David Kennedy. I have taken one class with each of my recommenders, was a Research Assistant for Professor Kaufman, and partook in N.Y.U.'s Government Civil Litigation Externship at the United States Attorney's Office for the Southern District of New York under Professor Kennedy's supervision.

Below is the contact information for my recommenders:
Dean Trevor Morrison: (212) 998-6000 | trevor.morrison@nyu.edu
Professor Emma Kaufman: (212) 998-6250 | emma.kaufman@nyu.edu
Professor David Kennedy: (212) 637-2733 | david.kennedy2@usdoj.gov

In addition, the Honorable Sarah L. Cave has graciously agreed to serve as a reference; I served as her judicial intern after my first year of law school. She can be reached at (212) 805-0214 and Cave_NYSDChambers@nysd.uscourts.gov. President and Dean Emeritus John Sexton, who co-taught the seminar in which I first drafted my Note, has also agreed to serve as a reference; he can be reached at (212) 992-8040 and john.sexton@nyu.edu.

I would greatly appreciate the opportunity to interview with you. I can be reached by phone at (917) 526-3491 or by email at evan.ringel@law.nyu.edu. It would be an honor to learn from you through a clerkship. I thank you for your kind consideration.

Respectfully,
Evan A. Ringel

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EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
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Unofficial GPA: 3.78
Honors: *Florence Allen Scholar* (Top 10% of class after four semesters)
New York University Law Review, Senior Executive Editor
Note: *Putting God Between the Lines*, 97 N.Y.U. L. REV. (forthcoming Oct. 2022)
Activities: OUTLaw, Member
Jewish Law Students Association, Member

WILLIAMS COLLEGE, Williamstown, MA
B.A. in Political Science, *cum laude*, June 2017
Cumulative GPA: 3.80
Honors: Dean's List; Sentinels of the Republic Essay Prize
Activities: Williams College Jewish Association, Co-President
Study Abroad: SIT Study Abroad, Buenos Aires, Argentina, Spring 2016

EXPERIENCE

SULLIVAN & CROMWELL LLP, New York, NY
Associate, Fall 2022; ***3L Intern,*** Fall 2021–Spring 2022; ***Summer Associate,*** Summer 2021
Researched case law for briefs, internal memoranda, and oral argument preparation. Compiled questions for mock cross-examination.

PROFESSOR EMMA M. KAUFMAN, NYU SCHOOL OF LAW, New York, NY
Research Assistant, Spring 2021
Aided in research project focusing on territorial scope of state criminal law.

U.S. ATTORNEY'S OFFICE (CIVIL DIVISION), S.D.N.Y., New York, NY
Government Civil Litigation Extern, Spring 2021
Researched and drafted complaints, deposition questions, statements of interest, and internal memoranda. Analyzed deposition transcripts to gather evidence.

HON. SARAH L. CAVE, UNITED STATES MAGISTRATE JUDGE, S.D.N.Y., New York, NY
Judicial Intern, Summer 2020
Researched and prepared initial drafts of opinions and reports and recommendations, implemented revisions, and ensured that citations were properly formatted. Performed research and cite-checking assignments.

HUGHES HUBBARD & REED LLP, New York, NY
Litigation Paralegal, September 2018–August 2019
Provided attorneys with litigation support. Maintained and updated case tracking documents. Prepared for depositions. Translated between Spanish and English for pro bono client meetings, court appearances, and filings.

NATIONAL IMMIGRANT JUSTICE CENTER, Chicago, IL
Avodah Paralegal Fellow, LGBT Immigrant Rights Initiative, September 2017–August 2018
Conducted intakes of potential clients. Assisted with filing asylum and other relief applications, employment authorization applications, and petitions with USCIS. Compiled asylum filings including completing affidavits with clients and engaging in research of treatment of LGBT individuals in various countries. Prepared court filings.

ADDITIONAL INFORMATION

Fluent in Spanish. Proficient in Microsoft Office suite, iManage, Relativity, and Concordance.
Interests include the Yankees, Bruce Springsteen, and running.

Name: Evan A Ringel
Print Date: 02/06/2022
Student ID: N11095013
Institution ID: 002785
Page: 1 of 1

New York University
Beginning of School of Law Record

Fall 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Amanda S Sen			
Criminal Law		LAW-LW 11147	4.0	A
Instructor:	Rachel E Barkow			
Procedure		LAW-LW 11650	5.0	A-
Instructor:	Burt Neuborne			
Contracts		LAW-LW 11672	4.0	B+
Instructor:	Clayton P Gillette			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
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Constitutional Law		LAW-LW 10598	4.0	CR
Instructor:	Daryl J Levinson			
Lawyering (Year)		LAW-LW 10687	2.5	CR
Instructor:	Anna Arons			
Legislation and the Regulatory State		LAW-LW 10925	4.0	CR
Instructor:	Emma M Kaufman			
Torts		LAW-LW 11275	4.0	CR
Instructor:	Barry E Adler			
1L Reading Group		LAW-LW 12339	0.0	CR
Topic:	Crises of Democracy, Globaliza			
Instructor:	Mariano Florentino Cuellar			
Financial Concepts for Lawyers		LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Colloquium on Constitutional Theory		LAW-LW 10031	2.0	A
Instructor:	Daryl J Levinson Trevor W Morrison			
Corporations		LAW-LW 10644	5.0	A
Instructor:	Jennifer Hall Arlen			
Evidence		LAW-LW 11607	4.0	A-
Instructor:	Daniel J Capra			
Introduction to Accounting and Finance		LAW-LW 12337	3.0	B+
Instructor:	April Klein			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Complex Litigation		LAW-LW 10058	4.0	A
Instructor:	Samuel Issacharoff Arthur R Miller			
Free Speech		LAW-LW 10668	3.0	A
Instructor:	Amy M Adler			
Government Civil Litigation Externship-Southern District		LAW-LW 11701	3.0	A
Instructor:	David Joseph Kennedy Seungkun Kim			
Government Civil Litigation Externship - Southern District Seminar		LAW-LW 11895	2.0	A-
Instructor:	David Joseph Kennedy Seungkun Kim			
Research Assistant		LAW-LW 12589	1.0	CR
Instructor:	Emma M Kaufman			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	57.0	57.0

Allen Scholar-top 10% of students in the class after four semesters

Fall 2021

School of Law
Juris Doctor
Major: Law

The Law of Democracy		LAW-LW 10170	4.0	A-
Instructor:	Richard H Pildes			
Quantitative Methods Seminar		LAW-LW 10794	2.0	A-
Instructor:	Daniel L Rubinfeld Katherine B Forrest			
Law Review		LAW-LW 11187	2.0	CR
Professional Responsibility and the Regulation of Lawyers		LAW-LW 11479	2.0	A-
Instructor:	Geoffrey P Miller			
Teaching Assistant		LAW-LW 11608	1.0	CR
Instructor:	Sandeep S Dhaliwal			
Religion and the First Amendment		LAW-LW 12135	2.0	A
Instructor:	Schneur Z Rothschild John Sexton			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	70.0	70.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Survey of Securities Regulation		LAW-LW 10322	4.0	***
Instructor:	James B Carlson			
Teaching Assistant		LAW-LW 11608	1.0	***
Instructor:	Sandeep S Dhaliwal			
Federal Courts and the Federal System		LAW-LW 11722	4.0	***
Instructor:	Helen Hershkoff			
Property		LAW-LW 11783	4.0	***
Instructor:	Frank K Upham			

	AHRS	EHRS
Current	13.0	0.0
Cumulative	83.0	70.0

Staff Editor - Law Review 2020-2021
Senior Executive Editor - Law Review 2021-2022

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

The following guidelines represent NYU School of Law's current guidelines for the distribution of grades in a single course. Note that JD and LLM students take classes together and the entire class is graded on the same scale.

A+ = 0-2%	**A** = 7-13%	**A-** = 16-24%
B+ = 22-30%	**B** = Remainder	**B-** = 0-8% (First-Year JD); 4-11% (All other JD and LLM)
C/D/F = 0-5%	**CR** = Credit	**IP** = In Progress
EXC = Excused	**FAB** = Fail/Absence	**FX** = Failure for cheating
*** = Grade not yet submitted by faculty member		
Maximum for A tier = 31%; Maximum grades above B = 57%		

The guidelines for first-year JD courses are mandatory and binding on faculty members. In all other cases, they are advisory but strongly encouraged. These guidelines do not apply to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students taking the course for a letter grade.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

***Pomeroy Scholar**:*	Top ten students in the class after two semesters
***Butler Scholar**:*	Top ten students in the class after four semesters
***Florence Allen Scholar**:*	Top 10% of the class after four semesters
***Robert McKay Scholar**:*	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year or to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process for all NYU School of Law students is highly selective and seeks to enroll individuals of exceptional ability. The Committee on Admissions selects those candidates it considers to have the very strongest combination of qualifications and the very greatest potential to contribute to the NYU School of Law community and the legal profession. The Committee bases its decisions on intellectual potential, academic achievement, character, community involvement, and work experience. For the Class entering in Fall 2020 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 172/167 and 3.9/3.7. Because of the breadth of the backgrounds of LLM students and the fact that foreign-trained LLM students do not take the LSAT, their admission is based on their prior legal academic performance together with the other criteria described above.

Updated: 9/14/2020

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WILLIAMS COLLEGE
Office of the Registrar

02-JUN-2021

Name: Evan A. Ringel

Class: 2017

Date of Birth: 04/04/XX

Program: Undergraduate Degree

Fall 2013-2014				
1960-69. Two Years in America	HIST	168	1	A
Multivariable Calculus	MATH	150	1	B+
Power, Politics, Democracy Amer	PSCI	201	1	A
Intermediate Spanish	RLSP	103	1	A
Semester GPA: 3.75 Cum. GPA: 3.75			Dean's List	
Winter Study 2013-2014				
The Work of the Supreme Court	SPEC	12	1	P
Spring 2013-2014				
US and the Middle East	HIST	311	1	A-
American Political Thought	LEAD	312T	1	A-
Israeli Politics	PSCI	268	1	A-
Adv Composition & Conversation	RLSP	106	1	A
Semester GPA: 3.75 Cum. GPA: 3.75			Dean's List	
Fall 2014 2015				
Leadership at America Founding	HIST	357	1	A
Jewish America	JWST	209	1	A-
Leadership Am Pol Development	PSCI	314	1	A-
Statistics & Data Analysis	STAT	201	1	B+
Semester GPA: 3.67 Cum. GPA: 3.72			Dean's List	
Winter Study 2014-2015				
Independent Study: Religion Comparing Judaism: US/Israel	REL	99	1	P
Spring 2014-2015				
Intro to American Studies	AMST	201	1	A-
Moses	COMP	214	1	B+
USA in Comparative Perspective	PSCI	248T	1	A-
Race, Culture, Incarceration	PSCI	313	1	A
Semester GPA: 3.67 Cum. GPA: 3.71			Dean's List	
Fall 2015-2016				
Judaism: Before The Law	JWST	101	1	A-
Intro Comparative Politics	PSCI	204	1	A
New Left&Neolib in Latin Amer	PSCI	351	1	A
Modernism to ElBoom delaNovela	RLSP	303	1	A
Semester GPA: 3.92 Cum. GPA: 3.75			Dean's List	
Winter Study 2015-2016				
Privacy and National Security	PSCI	24	1	P
Awarded transfer credit for 1 semester for work completed at the SIT Study Abroad Program in Argentina, Spring 2016.				
Fall 2016-2017				
Energy Science & Technology	ENVI	108	1	A
Israeli-Palestinian Conflict	JWST	480T	1	A
The Civil War in Syria	PSCI	440	1	A
Dictatorship and the Novel	RLSP	319	1	A
Semester GPA: 3.92 Cum. GPA: 3.78			Dean's List	
Winter Study 2016-2017				
Yoga Practice and Theory	REL	14	1	P
Spring 2016 2017				
Iraq & Iran in 20th Century	HIST	310	1	A
Memory, History, Extermination	JWST	490T	1	A
Politics of the Middle East	PSCI	245	1	A-
Sr Sem:Interp of Amer Politics	PSCI	410	1	A
Semester GPA: 3.92 Cum. GPA: 3.80			Dean's List	

Degree: Bachelor of Arts
Date Graduated: June 4, 2017

Major(s): Political Science
Concentration(s): Jewish Studies
Certificate(s): Spanish

Honors:
Cum Laude

Awards:
June 2017 - Sentinels of the Republic Essay Prize in Government

********** End of Transcript. **********

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

With great enthusiasm, I write to recommend**Evan Ringel** for a clerkship in your chambers. Evan will be an outstanding law clerk. He has my very strong support.

I got to know Evan this past fall, when I co-taught a colloquium on constitutional theory in which he enrolled. The colloquium was organized around a series of paper presentations by leading legal academics from across the country. The students wrote response papers and participated in seminar discussions of the presentations. Throughout the semester, Evan was one of the real leaders of the class. His questions were extremely perceptive, reflecting both careful reading of the papers and thoughtful application of things he had learned elsewhere in law school. Evan's reflection papers were equally good, and also revealed him to be a truly gifted writer. He writes fluidly and clearly, without jargon. This will serve him extremely well as a clerk.

Outside the classroom, Evan is an important leader of the NYU Law community. He serves as Senior Executive Editor of the *New York University Law Review*and is also a member of OUTLaw and the Jewish Law Students Association.

During his 1L summer, Evan was a judicial intern with Magistrate Judge Sarah L. Cave of the Southern District of New York. He is spending his 2L summer at Sullivan & Cromwell. Evan has also gained valuable experience as a research assistant to my colleague Professor Emma Kaufman, and in an externship at the U.S. Attorney's Office (Civil Division) in the Southern District of New York. All of these experiences will be valuable to him as a clerk.

To top it all off, I will add that Evan is a delightful person: friendly, inquisitive, and unpretentious. I am certain that he could fit in well to virtually any chambers. And I am equally certain that his work as a clerk will be outstanding. I urge you to give him close consideration.

Please do not hesitate to contact me if you would like any additional information.

Sincerely,

Trevor Morrison

Trevor Morrison - trevor.morrison@nyu.edu - 212-998-6000

New York University
A private university in the public service

School of Law

Emma Kaufman
Assistant Professor of Law

40 Washington Square South
New York, NY 10012-1099
Office: (212) 998-6250
Cell: (717) 514-2147
E-mail: emma.kaufman@nyu.edu

June 14, 2021

RE: Evan Ringel, NYU Law '22

Your Honor:

I'm writing to recommend my student, Evan Ringel, who has applied for a clerkship in your chambers. Evan is smart, creative, and diligent. He would make an excellent law clerk.

I first met Evan when he was a student in my 84-person course called Legislation and the Regulatory State (LRS). LRS, a required first-year course at NYU, can be challenging for many students. It is a crash course in statutory interpretation, structural constitutional law, and administrative law—full of tricky, unsettled doctrine and recent Supreme Court cases. LRS is a real conceptual departure for 1Ls who have been taking common-law courses like torts and criminal law, so it becomes a class where the most intellectually curious and serious students can rise to the occasion and stand out from the pack.

Evan was excellent in class. He was well-prepared, engaged, and thoughtful—the sort of student you could turn to when others faltered. In the end, I did not give Evan a grade in my course. (The COVID-19 pandemic began about three weeks into the semester, and given the uneven effects the sudden onset of the pandemic had on the 1L class, the law school switched to a pass-fail format for the semester.) But I can report that Evan performed exceptionally well. His exam was sharp and beautifully-executed.

Based on his classroom performance (and great grades in other courses), I hired Evan as my Research Assistant during his second year of law school. I take RA hiring seriously, selecting only students who will understand tough assignments and do them well. Evan has not disappointed. His RA work—a series of clean, comprehensive legal memos on territorial jurisdiction in American criminal law—has been stellar. As an assistant, Evan has made my work better. He is whip-smart, dedicated, and exceedingly easy to supervise.

In short, Evan is the real deal. Having clerked for two years—first in the Southern District of New York, then on the D.C. Circuit—I appreciate the value of a clerk who can make chambers easier to run. Evan would be that sort of clerk.

I know Evan would learn a tremendous amount from working for you and I hope you'll take a serious look at his application. Please do not hesitate to reach out if I can offer any additional information.

Sincerely,

Emma Kaufman

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 3rd Floor
New York, NY 10007

June 2, 2021

Re: *Recommendation of Evan Ringel*

Dear Judge:

I am writing to recommend Evan Ringel for a clerkship in your Chambers. Evan interned with Assistant United States Attorneys in our Civil Division during the Spring 2021 semester as part of New York University Law School's Government Civil Litigation Clinic. I co-teach the class, which meets for two hours a week for classroom discussion, and keep apprised of the approximately twelve to fifteen hours of work per week done by the interns with their assigned AUSAs. Prior to becoming an Assistant United States Attorney in 2000, I clerked for the Hon. Kimba M. Wood of the Southern District of New York, and the Hon. Wilfred Feinberg of the U.S. Court of Appeals for the Second Circuit. Based on my own years as a law clerk, my classroom experience with Evan, and my discussions of him with the AUSAs for whom he worked, I believe that Evan would be an excellent law clerk.

Evan is extremely enthusiastic, hard-working, and deeply committed to being the best law student that he can be, and I have no doubt that he will give every effort to any work that he is assigned as a law clerk, for as long as necessary until the job is done right. His natural exuberance and eagerness shone through despite the limitations of the semester. As a result of the pandemic, students were required to do all of their field work and participate in the class, which consists of discussions and simulations as well as the occasional lecture, remotely. Evan was a particular standout in learning and adapting to the expectations for the class. One of the most difficult aspects of remote teaching is giving and receiving criticism, because the interpersonal element is significantly attenuated over video. However, more than any of the other students in the class this past semester, Evan was willing, even happy, to hear what he could improve upon, and he assiduously and sincerely worked harder and better as the semester proceeded.

In addition to the seminar, Evan was assigned to work with two AUSAs. One aspect of the clinic that challenges law students is that AUSAs are typically working on numerous complex matters simultaneously. To keep on top of the work, an intern must be able to address questions as they arise under very different statutes, under tight deadlines, and keep two different supervisors happy. This was particularly difficult during an all-remote semester, and adding to the difficulty was that we assigned Evan to one of our more demanding AUSAs. Yet both AUSAs to whom Evan was assigned gave him rave reviews, observing an enthusiasm and willingness to put in extraordinary effort, even working weekends although it is unusual for interns to do so. The AUSAs to whom Evan was assigned reported that all of his work was

terrific and on target, despite the wide array of subjects that he was asked to address, ranging from a factual and legal analysis of Medicare fraud, to the potential preclusive effects of criminal proceedings upon civil cases, to analyzing an adverse opinion on standing in an administrative law matter, to compiling and addressing a vast factual record in connection with a law enforcement misconduct investigation. Throughout, Evan was unfailingly pleasant, passionately interested in whatever subject was sent his way, and eager to learn and assist.

I recommend Evan highly as a law clerk. Please do not hesitate to contact me at the number below if you have any further questions.

Sincerely,

\s\ David J. Kennedy
David J. Kennedy
Assistant United States Attorney
Tel. No. (212) 637-2733
Fax No. (212) 637-0033

Putting God Between the Lines

Evan A. Ringel*

Introduction

In the 2021 redistricting cycle, the Maryland Citizens Redistricting Commission faced a conundrum. Bound by a state constitutional requirement to minimize the number of legislative

* This Note originated as a final paper for a seminar on the First Amendment's Religion Clauses. It has been accepted for publication by the *New York University Law Review*, and will appear in the October 2022 issue. It underwent light edits in the *Law Review*'s submission process. In the event that time prohibits you from reading the Note in its entirety, I would direct you to my analysis in Part III, beginning on page 30.

districts crossing the border between Baltimore City and the surrounding Baltimore County,[1] the Commission fielded competing complaints: Residents of Dundalk, just off the southeastern edge of Baltimore City in Baltimore County, objected to a districting plan that split their community into two districts, one of which extended outward from Baltimore City into Dundalk.[2] Meanwhile, Jewish residents of Pikesville, bordering the City in the northwest, argued that the Commission's drawing of districts respecting the border between the City and the County split their community, which is dispersed between the City and the County.[3] The Pikesville Jewish community's desire for representation was understandable: It is both more geographically concentrated than comparable communities in other cities, and its residents are more religiously observant, with particular policy preferences distinct from those of Baltimore's less observant Jews.[4]

Despite the fact that Dundalk and Pikesville border Baltimore City at opposite ends, the cascade of adjustments resulting from a change to one proposed district meant that the Commission could "kill two birds with one stone"—Dundalk could be united in one district that did not traverse county lines, and Pikesville's Jewish community could be united in one district that crossed the Baltimore City/Baltimore County line.[5]

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[1] *See* MD. CONST. art. III, § 4 ("Due regard shall be given to . . . the boundaries of political subdivisions."). *See generally In re* Legis. Districting of the State, 805 A.2d 292 (Md. 2002) (invalidating Maryland's redistricting plan for, *inter alia*, failing to respect the boundaries of political subdivisions).

[2] *See Maryland Citizens Redistricting Commission - Round 3 Public Meeting*, MD. CITIZENS REDISTRICTING COMM'N (Oct. 13, 2021), at 59:50, https://us06web.zoom.us/rec/play/Yl_UmMLE0yPZfDmZ0_yVeqewNJwAJm_753aHKhQBiloLGG4esA_WGW8V64mUuw9ci9sRJLP_5yA7kPyk.FzYZ_SgFOyKO9Pro?autoplay=true [hereinafter Oct. 13 Meeting Video]; *see also Maryland Citizens Redistricting Commission - Round 3 Public Meeting*, MD. CITIZENS REDISTRICTING COMM'N (Oct. 13, 2021), https://redistricting.maryland.gov/Documents/Meetings/2021-1013-Maryland-Citizens-Redistricting-Commission-Round-03-transcript.pdf [hereinafter Oct. 13 Meeting Transcript] (transcript of video).

[3] *See* Oct. 13 Meeting Video, *supra* note 2, at 1:01:30; *see also* Oct. 13 Meeting Transcript, *supra* note 2.

[4] *See* ERIC L. GOLDSTEIN & DEBORAH R. WEINER, ON MIDDLE GROUND: A HISTORY OF THE JEWS OF BALTIMORE 301–20 (2018) (describing the contemporary Jewish communal landscape and tensions in Baltimore). For an overview of the history of Pikesville's status as the locus of Baltimore's Jewish community, see generally *id.* at 244–300.

[5] *See Maryland Citizens Redistricting Commission - Round 3 Public Meeting*, MD. CITIZENS REDISTRICTING COMM'N (Oct. 20, 2021), at 1:07:30, https://us06web.zoom.us/rec/play/GUBEzHI_wuQDJ9GYKKNrf1W3XsPHktA2fmcGodJp0k5Hn0CfXlqKDhvOUO-_wIGbKYIazgZAVH91pFOF.NgHg842TBcuZj_A2?autoplay=true (describing the ripple effect of changes made

In reaching this solution, tough decisions had to be made. As Professor Nathaniel Persily—tasked by the Commission to create the districts using online mapping technology—put it, much "depend[ed] on how we define the Jewish community."[6] This is a paradox inherent in the redistricting process: Districts can be drawn to keep "communities of interest"—here, Pikesville's Jewish community—whole, but it can often be difficult to define and delineate the boundaries of such communities.[7] The Commission heard testimony noting that the earlier, objected-to districting scheme split Pikesville's *eruv*, a physical wire encircling the Jewish community and established by the community that allows observant Jews to carry items outside the home on Shabbat.[8] Here, the community had set a boundary for itself.[9] The area contained within Pikesville's *eruv* is displayed below in Figure 1.

to the Dundalk district); *MCRC Working Session*, MD. CITIZENS REDISTRICTING COMM'N (Oct. 28, 2021), at 3:30, 41:39, 49:06, https://us06web.zoom.us/rec/play/I4c7G2TJ3CNtb8yT7unHdHMdIgC4CTrHV_wJJltuWMZen6rgIEaYX6_NRxHng973BsuB-YuGJvyPoMe7.RL0-wu_YkjRf81tQ?autoplay=true [hereinafter Oct. 28 Meeting Video] (explaining the "two birds with one stone" solution); *see also Maryland Citizens Redistricting Commission - Round 3 Public Meeting*, MD. CITIZENS REDISTRICTING COMM'N (Oct. 20, 2021), https://redistricting.maryland.gov/Documents/Meetings/2021-1020-Maryland-Citizens-Redistricting-Commission-Round-3-Public-Meeting-transcript.pdf (transcript of video); *Maryland Citizens Redistricting Commission Working Meeting*, MD. CITIZENS REDISTRICTING COMM'N (Oct. 28, 2021), https://redistricting.maryland.gov/Documents/Meetings/2021-1028-Maryland-Citizens-Redistricting-Commission-Working-Meeting-transcript.pdf [hereinafter Oct. 28 Meeting Transcript] (transcript of video).

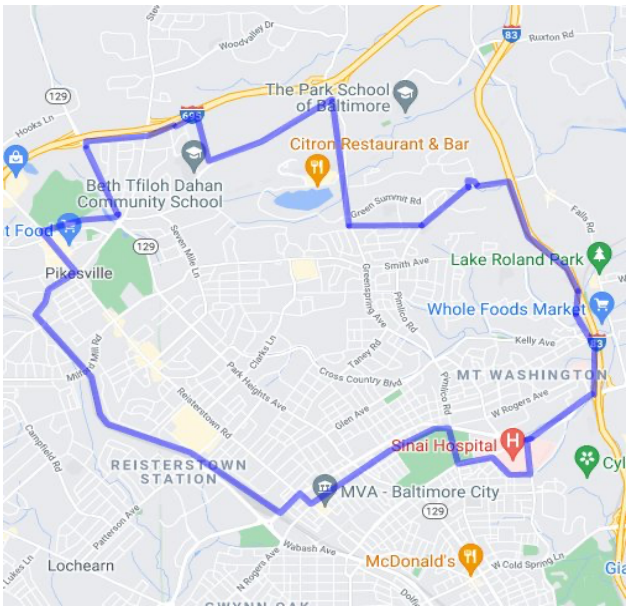
[6] *Maryland Citizens Redistricting Commission - Round 3 Public Meeting*, MD. CITIZENS REDISTRICTING COMM'N (Oct. 27, 2021), at 1:07:30, https://us06web.zoom.us/rec/play/oeJTzoZfmTtS7fKFVG5PznrBODWNQVXZospNtMiO9DWo9DX3ocCx8QZisCsow36h7mVGf_fdyI246BfZ.b9_oWIqnYWjsTMB5?autoplay=true [hereinafter Oct. 27 Meeting Video]; *see also Maryland Citizens Redistricting Commission - Round 3 Public Meeting*, MD. CITIZENS REDISTRICTING COMM'N (Oct. 27, 2021), https://redistricting.maryland.gov/Documents/Meetings/2021-1027-Maryland-Citizens-Redistricting-Commission-Round-3-Public-Meeting-transcript.pdf [hereinafter Oct. 27 Meeting Transcript] (transcript of video).

[7] *See infra* Section II.A.

[8] Shabbat is the Jewish sabbath. For more on the religious background of the *eruv*, see *infra* notes 21–39 and accompanying text.

[9] *See* GOLDSTEIN & WEINER, *supra* note 4, at 207 (identifying the purpose of Pikesville's *eruv* as a means "to unite a community and bring its inhabitants closer together" (internal citations omitted)).

Figure 1. The Pikesville *Eruv*[10]



The Commission was interested in using the *eruv* as a starting point for determining the district's boundaries.[11] Ultimately, the area covered by Pikesville's *eruv* was the size of 1.2 districts and could not be followed exactly because of equipopulation concerns.[12] In presenting the final redistricting plan, Professor Persily noted that most of the *eruv* was contained in the Pikesville district.[13]

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[10] *Baltimore MD Eruv Map*, GOOGLE MAPS (June 15, 2015), https://www.google.com/maps/d/u/0/viewer?ie=UTF8&oe=UTF8&msa=0&mid=1eLRnHBNpeHtJxk1VOBLO_NZ2SmA&ll=39.37478180833499%2C-76.70482653186033&z=12.

[11] *See* Oct. 27 Meeting Video, *supra* note 6, at 2:01:06; *see also* Oct. 27 Meeting Transcript, *supra* note 6.

[12] *See* Oct. 28 Meeting Video, *supra* note 5, at 21:45; *see also* Oct. 28 Meeting Transcript, *supra* note 5. The equipopulation principle in districting emerged in *Reynolds v. Sims*, 377 U.S. 533 (1964).

[13] *See Final Maryland Citizens Redistricting Commission Meeting - Summary of Events and Final Maps*, MD. CITIZENS REDISTRICTING COMM'N (Nov. 3, 2021), at 12:45, https://us06web.zoom.us/rec/play/tYJ74Vb3UlcFWssqs8GxxlxA1O44UaeO8mCFlwR857bImAOYGMR-4slGqUTCmwo8J_syy78GXW3xTSgM.NhSNnREK2B897xHK?autoplay=true [hereinafter Nov. 3 Meeting Video]; *see also See Final Maryland Citizens Redistricting Commission Meeting - Summary of Events and Final Maps*, MD. CITIZENS REDISTRICTING COMM'N (Nov. 3, 2021), https://redistricting.maryland.gov/Documents/Meetings/2021-1103-Final-MD-Citizens-Commission-Meeting-Summary-and-Final-Maps-transcript.pdf [hereinafter Nov. 3 Meeting Transcript] (transcript of video).

The allure of using the *eruv* as a basis for drawing district lines is clear: In the tempestuous process of defining communities of interest[14]—one that will inevitably spark disagreement, dissatisfaction, and dissent—deferring boundary-setting to a physical, objective metric established by a community itself would appear to be a safe harbor, insulating line-drawers from criticism.[15] However, in this Note, I argue that rather than serving as a safe harbor, this use of the *eruv* in redistricting presents a constitutional hazard, as it may run afoul of the Establishment Clause. The Supreme Court's Establishment Clause jurisprudence clearly forbids a state from "delegat[ing] its civic authority to a group chosen according to a religious criterion,"[16] a prohibition known as the Establishment Clause nondelegation doctrine. The use of an *eruv* as a basis for redistricting, I argue, is precisely such a delegation: The state delegates its power to determine the boundaries of a community and the resultant district lines to religious authorities and a religious community, bucking the neutrality commanded by the Establishment Clause.[17] Yet the mere *potential* for such a violation has not yet been explored until now, and with Jewish communities across the country rightfully seeking representation in the redistricting process,[18] and with more than 130 *eruvim*[19] in the United States,[20] line-drawers ought to seriously consider these constitutional implications.

---

[14] Representation of communities of interest is one of the traditional districting criteria that mapmakers consider when drawing legislative districts. *See infra* Section II.A.

[15] *See* Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 440 (2001) ("The eruv literally attaches normative weight to jurisdictional lines; it represents the rare situation in which the normative community is coextensive with the descriptive neighborhood (as defined by the limits of the eruv)."); *see also* Charlotte Elisheva Fonrobert, *The Political Symbolism of the Eruv*, JEWISH SOC. STUD., Spring/Summer 2005, at 9, 10 ("[The *eruv*] operates as a boundary-making device, quite concretely in relationship to the residential space of the neighborhood that the eruv community inhabits.").

[16] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 698 (1994) (plurality opinion).

[17] *See infra* Sections III.A–B.

[18] *See, e.g.*, Louis Keene, *L.A. Redistricting Plan Empowers Jewish Voters*, Forward (Sept. 30, 2021), https://forward.com/news/476153/la-city-council-redistricting-plan-explained-k2 (describing the efforts of the Jewish community in Los Angeles to obtain representation in the latest round of redistricting for the Los Angeles City Council).

[19] *Eruvim* is the Hebrew plural of *eruv*.

[20] Alexandra Lang Susman, *Strings Attached: An Analysis of the Eruv Under the Religion Clauses of the First Amendment and the Religious Land Use and Institutionalized Persons Act*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 93, 93 (2009).

The *eruv* is a religious practice that is vital to observant Jewish communal life. Jewish law is replete with prohibitions against engaging in various activities on Shabbat.[21] Particularly relevant here is the prohibition against the "lifting, carrying, or pushing of objects outside of the private space of the home" on Shabbat.[22] Such objects include, *inter alia*, strollers, wheelchairs, books, and keys.[23] Carrying such items is permitted within the home and synagogue, but "[t]he problem, for the observant Jew, involves travel from one private area to another across an area where carrying is forbidden."[24] By the letter of the law, many observant Jews would be effectively homebound on Shabbat, unable to transport themselves or their loved ones to synagogue or relatives' homes, and unable to lock their doors.[25]

Enter the *eruv*. From the Hebrew for "mix or join together,"[26] the *eruv* is "a symbolic and physical extension of the 'private domain' and thus enables religiously observant Jews to do acts that would normally be only permitted in such a domain, like carrying or pushing, without violating" the laws of Shabbat.[27] Often encircling entire Jewish communities,[28] the presence of an *eruv* is a necessary prerequisite for full participation in the various aspects of Shabbat observance in conformance with Jewish law.[29]

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[21] *See* Susman, *supra* note 20, at 97. There are thirty-nine prohibitions in total, include those against "the raising or lowering of a flame, which includes turning lights on and off," "writing with a pen or a computer," and "driving." *Id.* at 98.
[22] *Id.*
[23] *See id.*
[24] Zachary Heiden, *Fences and Neighbors*, 17 LAW & LITERATURE 225, 231 (2005).
[25] *See id.* ("[I]f you have a small child, how could you leave the house if you cannot carry her or push him in a baby carriage? How could you leave the house at all, if you are unable to lock the door behind you and carry a key so that you might get back in?").
[26] *Id.*
[27] Schragger, *supra* note 15, at 438.
[28] Some can be particularly large: The *eruv* in Los Angeles contains about eighty square miles. *See* Susman, *supra* note 20, at 94 n.6.
[29] *See* Schragger, *supra* note 15, at 439. For examples of guidance and stories pertaining to Shabbat observance without an *eruv*, see Letter from David Wolkenfeld, Rabbi, Anshe Sholom B'nai Israel Congregation (n.d.), https://images.shulcloud.com/626/uploads/Guide%20to%20Shabbat%20Without%20Eruv.pdf (instructing congregants on how to prepare for a Shabbat without the use of an *eruv*); Blu Greenberg, *Eruv & Women*, MY JEWISH LEARNING, https://www.myjewishlearning.com/article/eruv-women (last visited Feb. 14, 2022) (retelling how the author would hide a comb and lipstick at her synagogue because she could not carry these items in the absence of an

The salience and importance of the *eruv* depends on one's own level of religious observance. Observant Jews, often identifying as Orthodox or Haredi (ultra-Orthodox) are, of course, particularly desirous of *eruvim*—but such Jews are a minority in the United States, albeit a fast-growing one.[30] Less observant Jews, including those belonging to the Conservative and Reform denominations,[31] do not place as much weight on following the laws of Shabbat: Among all American Jews, only thirty-nine percent reported that they sometimes or often mark Shabbat in a way that is personally meaningful.[32]

Eruvim are physical structures, constructed by hanging wires or strings on utility poles, or by using plastic strips to designate existing wires as part of the *eruv*.[33] Meant to symbolize the walls of a dwelling, an *eruv* must be continuous, completely enclosing what is to become the "private" space.[34] Importantly, a degree of community organizing is required to establish an *eruv*: According to Jewish law, in order for an *eruv* to be properly considered a private space for religious purposes, the Jewish community must "go public"[35]—a public authority must recognize the *eruv*

eruv). Another notable practice to get around the more restrictive aspects of the laws of Shabbat is the use of a *shabbos goy*, a non-Jew who is asked to perform forbidden tasks. *See* Rachel Druck, *The Shabbos Goy to the Rescue*, ANU: MUSEUM OF THE JEWISH PEOPLE (Feb. 11, 2018), https://www.anumuseum.org.il/blog-items/shabbos-goy-rescue.

[30] *See* PEW RSCH. CTR., JEWISH AMERICANS IN 2020, at 9 (2021), https://www.pewforum.org/wp-content/uploads/sites/7/2021/05/PF_05.11.21_Jewish.Americans.pdf (finding that nine percent of Jews in the United States identify as Orthodox, but among those between the ages of eighteen and twenty-nine, that number jumps to seventeen percent).

[31] Seventeen percent of American Jews consider themselves to be Conservative, and thirty-seven percent consider themselves to be Reform. *Id.* at 14. Thirty-two percent of American Jews do not identify with any religious denomination. *Id.* While beyond the scope of this Note, it is important to recognize that Judaism is more than just a religion, and Jews differ as to what it means to be Jewish. *See id.* at 56 ("U.S. Jews do not have a single, uniform answer to what being Jewish means. When asked whether being Jewish is mainly a matter of religion, ancestry, culture, or some combination of those things, Jews responded in a wide variety of ways . . . .").

[32] *Id.* at 25; *see also id.* at 15 ("Conservative and Reform Jews tend to be less religiously observant in traditional ways. . . .").

[33] *See* Shira J. Schlaff, Comment, *Using an Eruv to Untangle the Boundaries of the Supreme Court's Religion-Clause Jurisprudence*, 5 U. PA. J. CONST. L. 831, 832–33 (2003). For a visual depiction of a portion of New York City's *eruv*, see Norberto Briceño (@norbertobriceno), *Kinda Interesting Things #8: The Fishing Line Above Manhattan*, TIKTOK (Dec. 4, 2021), https://www.tiktok.com/@norbertobriceno/video/7037912277638466821.

[34] *See* Schlaff, *supra* note 33, at 832–33; Susman, *supra* note 20, at 94.

[35] Charlotte Elisheva Fonrobert, *Installations of Jewish Law in Public Urban Space: An American Eruv Controversy*, 90 CHI.-KENT L. REV. 63, 64 (2015).

as such, and lease the area contained within the *eruv* to the Jewish community in exchange for (nominal) consideration.[36] Such a leasing arrangement furthers the fiction that the area contained within the *eruv* is a single dwelling and symbolically transforms the public space into a private domain.[37] *Eruvim* often go unnoticed[38]—part of the web of wires that are a fixture of modern life—but for those who utilize them, "[t]he space within the *eruv* takes on social meaning: it becomes religiously identified, normatively 'restricted' space," emphatically, though subtly, defined as Jewish.[39]

This Note proceeds in three Parts. Part I outlines the Supreme Court's Establishment Clause jurisprudence. Part II explores the tensions inherent in the redistricting process, focusing on the communities of interest inquiry. Finally, Part III shows how the use of the *eruv* in redistricting can violate the Establishment Clause and crafts a standard for finding such a violation.

Part I. The Establishment Clause

The First Amendment prohibits Congress[40] from making a "law respecting an establishment of religion."[41] The Supreme Court's modern Establishment Clause jurisprudence—and the understanding of the Clause in the eyes of the average American—begins with Justice Black's quotation of Thomas Jefferson in *Everson v. Board of Education of Ewing Township*:

[36] *See* Heiden, *supra* note 24, at 233; Susman, *supra* note 20, at 95 ("In order to create a valid eruv under Jewish law, a secular official with jurisdiction over the area in question must issue a ceremonial governmental proclamation 'leasing' the enclosed public and private property to the Jewish community for a small fee. Leasing is essential because it permits Orthodox Jews to treat a whole city, or the portion of a city that is enclosed in an eruv's space, as if it were a single household, symbolically converting the public domain into private domain." (footnote omitted)); Fonrobert, *supra* note 27, at 64 n.3.
[37] *See* Susman, *supra* note 20, at 95.
[38] *See* Susman, *supra* note 20, at 94.
[39] *See* Schragger, *supra* note 15, at 440.
[40] The Establishment Clause has been found to be applicable to the states via the Fourteenth Amendment. *See* Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 8 (1947). *But see* Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (arguing that because the Establishment Clause was originally meant to protect the states from a federal establishment of religion, "in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government").
[41] U.S. CONST. amend. I.

"[T]he clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[42] Yet as the Court continued to wrestle with Establishment Clause cases, the justices acknowledged that "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law,"[43] and thus sought a means by which to concretize the wall described by Justice Black, and Thomas Jefferson before him.[44] This Part traces the Supreme Court's efforts to craft an Establishment Clause jurisprudence in Section I.A, and then details lower court decisions applying this doctrine to allow both the establishment and maintenance of *eruvim* in Section I.B. Finally, Section I.C addresses what can be considered the purest form of Establishment Clause jurisprudence, the arguably *sui generis* context of the prohibition against the governmental delegation of civic authority to religious groups.

A. The *Lemon* Test and Its Discontents

The Supreme Court's Establishment Clause jurisprudence is notoriously tangled. The modern doctrine is rooted in the neat, bright-line test set forth in *Lemon v. Kurtzman*,[45] yet has grown more complex as the inadequacies and criticisms of *Lemon* mounted over time.[46] In *Lemon*, the Court set forth a troika of Establishment Clause requirements that a challenged statute must satisfy, emanating from its prior jurisprudence: (1) "[T]he statute [at issue] must have a secular legislative purpose,"[47] (2) "its principal or primary effect must be one that neither advances nor inhibits religion,"[48] and (3) "the statute must not foster 'an excessive government entanglement

[42] 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. (8 Otto) 145, 164 (1878)). For a glimpse of the resonance of this quote among the American public, see GREGORY A. SMITH, PEW RSCH. CTR., IN U.S., FAR MORE SUPPORT THAN OPPOSE SEPARATION OF CHURCH AND STATE (2021), https://www.pewforum.org/wp-content/uploads/sites/7/2021/10/PF_10.21.21_fullreport.pdf
[43] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
[44] *See* Letter from Thomas Jefferson to the Danbury Baptist Ass'n (Jan. 1, 1802), https://www.loc.gov/loc/lcib/9806/danpre.html.
[45] 403 U.S. 602.
[46] *See infra* notes 57–58 and accompanying text.
[47] *Lemon*, 403 U.S. at 612 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
[48] *Id.* (citing *Allen*, 392 U.S. at 243).

with religion.'"[49] Under *Lemon*, a failure to satisfy any of these three prongs constitutes an Establishment Clause violation.[50]

The *Lemon* test has attracted much judicial[51] and scholarly[52] criticism, with many arguing that it should be overruled, or that it already has been.[53] Yet rumors of *Lemon*'s demise have been greatly exaggerated, as the test still serves as an analytical touchstone in Establishment Clause jurisprudence, even if it is no longer mechanistically applied.[54] Nevertheless, *Lemon*'s place in Establishment Clause jurisprudence has certainly been diminished in the wake of Justice O'Connor's endorsement test, set forth in *Lynch v. Donnelly* as a refinement of the *Lemon* test.[55] As a general rule, the endorsement test

> dispenses with the "entanglement" prong of the *Lemon* test and collapses its "purpose" and "effect" prongs into a single inquiry: would a reasonable, informed observer, *i.e.*, one familiar with the history and context of private individuals'

[49] *Id.* at 613 (quoting Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 674 (1970)).
[50] *Id.* at 612–13; *see also* Jun Xiang, Note, *The Confusion of Fusion: Inconsistent Application of the Establishment Clause Nondelegation Rule in State Courts*, 113 COLUM. L. REV. 777, 780–82 (2013) (describing the *Lemon* test and its requirements).
[51] Justice Scalia described the *Lemon* test as "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring); *see also* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) (plurality opinion) (citing Establishment Clause cases in which the Supreme Court did not apply *Lemon* as reflective of the test's "shortcomings").
[52] *See, e.g.*, Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. L. REV. 795, 800 (1993) (describing criticism of *Lemon* as "well-deserved" and claiming that each of its prongs is fraught with a "major analytic flaw or ambiguity"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 119, 128 (1992) (arguing that *Lemon* can lead to "almost any result" and "has an inherent tendency to devalue religious exercise").
[53] *See, e.g.*, *Am. Legion*, 139 S. Ct. at 2093 (Kavanaugh, J., concurring) (arguing that *Lemon* is bad law, reflective of the fact that the majority and plurality in that case declined to explicitly overrule it).
[54] *See, e.g.*, *id.*; *id.* at 2094 (Kagan, J., concurring in part) ("Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere . . . ."); Van Orden v. Perry, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (describing *Lemon* as a "guidepost[]"); Jewish People for the Betterment of Westhampton Beach v. Vill. of Westhampton Beach, 778 F.3d 390, 395 (2d Cir. 2015) (per curiam) (noting continued applicability of *Lemon* despite criticism); Mitchell Chevru Johnson, *Stepification*, 116 NW. U. L. REV. 383, 421 (2021) ("While *Lemon* captures certain essentials about the Establishment Clause, a rigid application of its steps leads occasionally to results that a majority of the Court considers unacceptable. As a result, while there is no majority to discard the test, the Court is willing to disregard it in particular cases where its straightforward application would lead to the 'wrong' result.").
[55] *See* Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) ("Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device."); *see also* Joanne Kuhns, Case Comment, Board of Education of Kiryas Joel Village School District v. Grumet*: The Supreme Court Shall Make No Law Defining an Establishment of Religion*, 22 PEPP. L. REV. 1599, 1645–49 (1995) (describing the history of the endorsement test).

> access to the public money or property at issue, perceive the challenged government action as endorsing religion?[56]

The following Section shows how lower courts have applied these tests to actions involving both the establishment and maintenance of *eruvim*.

B. The *Eruv* and the Establishment Clause

The Supreme Court has never ruled on the Establishment Clause implications of the *eruv*. However, both the Second[57] and the Third[58] Circuits have opined on the matter, finding that the erection and maintenance, respectively, of an *eruv* did not violate the Establishment Clause. In the Second Circuit action, plaintiffs sought a declaratory judgment and an injunction preventing the construction of a proposed *eruv* in Westhampton Beach, New York, claiming that it would be an Establishment Clause violation.[59] In the Third Circuit action, plaintiffs claimed that Tenafly, New Jersey's selective enforcement of an ordinance prohibiting the placing of "any sign or advertisement, or other matter" on top of utility poles[60] against an already established *eruv* violated the Free Exercise rights of Tenafly's Orthodox Jewish residents.[61]

Both Circuits found that the *eruvim* at issue did not implicate Establishment Clause concerns, but each took a different route to arrive at this conclusion. The Second Circuit applied

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[56] Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 174 (3d Cir. 2002) (citing Zelman v. Simmons-Harris, 536 U.S. 639, 654–55 (2002)). Entanglement is still relevant in specific contexts: aid to religious schools and delegation of governmental authority to religious groups. *See id.* at 174 n.36.
[57] *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d 390.
[58] *Tenafly Eruv Ass'n*, 309 F.3d 144.
[59] *See Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 393. For a satirical take on the factual background of the Second Circuit case, see *The Thin Jew Line*, DAILY SHOW WITH JON STEWART (Mar. 23, 2011), https://www.cc.com/video/1jsrl7/the-daily-show-with-jon-stewart-the-thin-jew-line. For a more detailed overview of the facts, see generally Fonrobert, *supra* note 27.
[60] *Tenafly Eruv Ass'n*, 309 F.3d at 151 (quoting Tenafly, N.J., Ordinance 691, art. VIII(7) (Oct. 26, 1954)). In full, the ordinance reads: "No person shall place any sign or advertisement, or other matter upon any pole, tree, curbstone, sidewalk or elsewhere, in any public street or public place, excepting such as may be authorized by this or any other ordinance of the Borough." Tenafly, N.J., Ordinance 691, art. VIII(7).
[61] *See Tenafly Eruv Ass'n*, 309 F.3d at 151.

the *Lemon* test,[62] first finding the presence of a secular governmental purpose because in permitting the construction of the *eruv*, the Long Island Power Authority (LIPA)—the state actor on whose utility poles the *eruv* was constructed—was accommodating religious observance in a neutral manner.[63] Construing *Lemon*'s effect prong as whether a reasonable third party would perceive governmental endorsement of religion from the action, the court found that "[n]o reasonable observer who notices the strips on LIPA utility poles would draw the conclusion that a state actor is thereby endorsing religion."[64] Finding no risk of entanglement,[65] the court held that "LIPA's action permitting the . . . erect[ion of] the *eruv* is not an unconstitutional establishment of religion."[66]

In the Third Circuit action, Tenafly's enforcement of its no-placing ordinance against an *eruv* was subject to strict scrutiny.[67] Tenafly argued that maintaining the *eruv* would violate the Establishment Clause, and thus its enforcement of the ordinance against the *eruv* satisfied strict scrutiny's compelling interest requirement.[68] The Third Circuit noted that *Lemon* had been eschewed by the Supreme Court in favor of the endorsement test—"dispens[ing] with the

[62] The Second Circuit noted, however, that the *Lemon* test is "much criticized." *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 395 (quoting Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J., 760 F.3d 227, 238 n.12 (2d Cir. 2014)); *see also supra* Section I.A.
[63] *Jewish People for the Betterment of Westhampton Beach*, 778 F.3d at 396.
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *See Tenafly Eruv Ass'n*, 309 F.3d at 172. In the Free Exercise context, incidental burdens on religion from neutral and generally applicable state laws are not actionable. *See* Employment Division v. Smith, 494 U.S. 872, 879 (1990); *see also* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (finding the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4), to be unconstitutional as applied to the states, thus leaving the *Smith* test in place for Free Exercise challenges to state laws). However, if a law discriminates against religion or is not generally applicable, strict scrutiny is triggered. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 542 (1993). Strict scrutiny was triggered in the *Tenafly Eruv Ass'n* case because the selective enforcement of the ordinance belied its generally applicable language, evincing differential treatment of religion. *See Tenafly Eruv Ass'n*, 309 F.3d at 168; *see also id.* at 165–66 ("[I]n situations where government officials exercise discretion in applying a facially neutral law, so that whether they enforce the law depends on their evaluation of the reasons underlying a violator's conduct, they contravene the neutrality requirement if they exempt some secularly motivated conduct but not comparable religiously motivated conduct.").
[68] *See Tenafly Eruv Ass'n*, 309 F.3d at 174.

'entanglement' prong of the *Lemon* test and collaps[ing] its 'purpose' and 'effect' prongs into a single inquiry: would a reasonable, informed observer . . . perceive the challenged government action as endorsing religion?"[69] In applying the endorsement test, the court found that "if the Borough [of Tenafly] ceased discriminating against the plaintiffs' religiously motivated conduct to comply with the Free Exercise Clause, a reasonable, informed observer would not perceive an endorsement of Orthodox Judaism," but rather a permissible, neutral accommodation of religion.[70] Moreover, the construction of the *eruv* by private actors, not the government, and its maintenance via private funds militated against an endorsement finding.[71] Even if one were to gain a misperception of endorsement, the court ruled that "there is a much greater risk that the observer would perceive hostility toward Orthodox Jews if the Borough removes the [*eruv*]."[72] In a footnote, the court noted that allowing the *eruv* to remain would also satisfy the *Lemon* test.[73] Thus, avoiding an Establishment Clause violation could not serve as a compelling interest for Tenafly's actions to remove the *eruv*.[74]

Having set forth the (admittedly indeterminate) scope of what the Establishment Clause prohibits and examined the application of the Clause's jurisprudence to the particular context of the *eruv*, the next Section turns to a particularized area of Establishment Clause jurisprudence: the nondelegation doctrine.

[69] *See id.* (collecting cases).
[70] *See id.* at 176.
[71] *See id.* at 177.
[72] *Id.*
[73] *Id.* at 177 n.41.
[74] *Id.* at 178.

C. Nondelegation: *Grendel's Den* and *Kiryas Joel*

The Establishment Clause's nondelegation doctrine can be thought of as perhaps its most "clear and obvious"[75] prohibition: "[G]overnment cannot delegate governmental power to religious institutions."[76] This Section explores the two Supreme Court cases that respectively establish and apply the nondelegation doctrine: *Larkin v. Grendel's Den, Inc.*,[77] and *Board of Education of Kiryas Joel Village School District v. Grumet*.[78] As a doctrinal matter, nondelegation under the Establishment Clause remains underdeveloped, in no small part because examples of such delegations are rare.[79] Indeed, it is the task of this Note to highlight the broader applicability of the Establishment Clause nondelegation doctrine and particularly the applicability of its prohibitions in voting rights jurisprudence.

The precise interaction between the *Lemon* test and the prohibition against delegation is unclear: Nondelegation can be considered as both an application of the *Lemon* test and as a freestanding Establishment Clause principle.[80] Accordingly, any potential further decline in the applicability of *Lemon*[81] would not necessarily lead to a corresponding demise of the applicability of the Establishment Clause's nondelegation prohibition.[82]

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[75] Xiang, *supra* note 50, at 777.
[76] Zalman Rothschild, Fulton*'s Missing Question: Religious Adoption Agencies and the Establishment Clause*, 100 TEX. L. REV. ONLINE 32, 35 (2021).
[77] 459 U.S. 116 (1982).
[78] 512 U.S. 687 (1994).
[79] *See id.* at 697 (plurality opinion) (describing *Grendel's Den* as "present[ing] an example of united civic and religious authority, an establishment rarely found in such straightforward form in modern America"); *see also* Rothschild, *supra* note 76, at 36 ("[T]he precise contours of the delegation prohibition have not been drawn . . . ."); Xiang, *supra* note 50, at 777–78 (arguing that state court experience shows that the doctrine is less straightforward than it might seem).
[80] *See* Xiang, *supra* note 50, at 784–85.
[81] *See supra* Section I.A.
[82] Indeed, the "clear and obvious" nature of such a prohibition would seemingly caution against such a demise. *See* Rothschild, *supra* note 76, at 35.

1. *Grendel's Den*

The Supreme Court's first foray into Establishment Clause nondelegation jurisprudence occurred in *Larkin v. Grendel's Den, Inc.*[83] Grendel's Den was (and still is[84]) a restaurant in Cambridge, Massachusetts, which had applied for a liquor license.[85] At the time, Massachusetts law dictated that a liquor license would be denied if a church or school within 500 feet of the applying establishment filed a written objection.[86] The Holy Cross Armenian Catholic Parish, located next door to Grendel's Den, objected to the liquor license, and on this basis, the application was denied.[87]

The restaurant appealed, and in an 8–1 decision, the Supreme Court found the statute to be violative of the Establishment Clause.[88] While Massachusetts defended its statute as a zoning regulation designed to "protect diverse centers of spiritual, educational and cultural enrichment,"[89] Chief Justice Burger, writing for the majority, found the statute to be more than just a zoning ordinance because it "delegate[d] to private, nongovernmental entities power to *veto* certain liquor license applications," a power normally exercised by governmental agencies.[90] Thus, the ordinary deference typically accorded to zoning regulations did not apply.[91]

Applying the *Lemon* test,[92] Chief Justice Burger found that the statute assigning the veto power to churches had a secular purpose.[93] However, because these purposes could have been

[83] 459 U.S. 116.
[84] GRENDEL'S DEN RESTAURANT & BAR, https://www.grendelsden.com (last visited Dec. 21, 2021).
[85] *Grendel's Den*, 459 U.S. at 117.
[86] *Id.*
[87] *See id.* at 117–18.
[88] *Id.* at 120.
[89] *Id.* The Supreme Court had previously blessed the use of zoning laws to effectively prohibit the establishment of adult theaters. *See* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 62–63 (1976).
[90] *Grendel's Den*, 459 U.S. at 122 (emphasis added).
[91] *Id.*
[92] As discussed above, *Grendel's Den* can be read as constructing the nondelegation prohibition as existing independently of *Lemon*. *See* Xiang, *supra* note 50, at 784–85, 785 n.54.
[93] *See Grendel's Den*, 459 U.S. at 123 ("There can be little doubt that this [statute] embraces valid secular legislative purposes.").

accomplished in other ways,[94] because there was no guarantee that churches' "standardless" veto power would be used in a religiously neutral way,[95] and because churches accrued "a significant symbolic benefit" by virtue of this conferral of power,[96] the statute was found to have "a 'primary' and 'principal' effect of advancing religion."[97]

Furthermore, the Court noted the statute's entanglement implications, reasoning that "[t]he Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."[98] Indeed that was found to be "the core rationale" for the Establishment Clause itself: "preventing 'a fusion of governmental and religious functions,'"[99] given that such entanglement risked the fomentation of religious strife.[100]

2. *Kiryas Joel*

Board of Education of Kiryas Joel Village School District v. Grumet[101] placed the fractured nature of the Court's Establishment Clause jurisprudence—and particularly Establishment Clause nondelegation jurisprudence—on full display. The facts of the case emanate from the aftershocks of the Court's decisions in *School District of the City of Grand Rapids v. Ball*[102] and *Aguilar v. Felton*,[103] companion cases which held that government funds could not be used to finance secular, remedial educational programs taught by public school teachers in religious schools.[104]

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[94] *Id.* at 123–24. Such measures included a flat ban on liquor sales within a certain distance from schools and churches and having hearings where churches and schools could present their views—but where such views would not automatically be controlling. *See id.* at 124.
[95] *Id.* at 125.
[96] *Id.* at 125–26.
[97] *Id.* at 126.
[98] *Id.* at 127.
[99] *Id.* at 126 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222 (1963)).
[100] *Id.* at 127.
[101] 512 U.S. 687 (1994).
[102] 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).
[103] 473 U.S. 402 (1985), *overruled by Agostini*, 521 U.S. 203.
[104] *Id.* at 413–14; *Ball*, 473 U.S. at 397–98. *Aguilar* and *Ball* represent the high-water mark of the separation of church and state, taking a decidedly formalistic view of the *Lemon* prohibitions. *See* Aguilar, 473 U.S. at 408–14. Just over a decade after deciding these companion cases, the Supreme Court reversed course in *Agostini v. Felton*—a case involving the same parties as *Aguilar*—holding that in the intervening years, the Court's Establishment Clause

Kiryas Joel is a village in Orange County, New York that is nearly exclusively comprised of Satmar Hasidim, an ultraorthodox Jewish sect

> who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls.[105]

The village itself was incorporated in 1977, splintering off from the adjacent town of Monroe as the result of a zoning dispute.[106] The children of Kiryas Joel attend sex-segregated religious schools, but such schools did not "offer any distinctive services to handicapped children, who are entitled under state and federal law to special education services even when enrolled in private schools."[107] Prior to the Court's *Aguilar* and *Ball* decisions, the Monroe–Woodbury Central School District funded programs that provided these services at one of Kiryas Joel's religious schools.[108]

In the wake of *Aguilar* and *Ball*, these programs were discontinued, and the children requiring these services received them at the Monroe–Woodbury public schools—the first exposure to the secular world for the students.[109] Faced with the trauma of culture shock, parents withdrew their children from the secular schools, and the children received services through private funding or did not receive services at all.[110] To address this situation, the New York State

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jurisprudence had cut away at the doctrinal underpinnings of the decisions in *Aguilar* and *Ball*. *Agostini*, 521 U.S. at 223 ("What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect."). *Agostini* thus blessed the use of government funds and public school teachers to provide remedial educational services to religious school students on the premises of religious schools—which would have obviated the need for the districting arrangement in *Kiryas Joel*. *See Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring).

[105] *Kiryas Joel*, 512 U.S. at 691.

[106] *Id.*; *see also id.* at 712 (O'Connor, J., concurring) (noting that the zoning dispute arose because the Satmars "subdivided their houses into several apartments" to accommodate their large, close-knit family groups, and because basements of buildings were used as schools and synagogues).

[107] *Id.* at 692 (majority opinion).

[108] *Id.*

[109] *Id.*

[110] *See id.* at 692–93 (noting "the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different" (alteration in original) (quoting Bd. of Educ. of Monroe–Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 180–81 (1988))).

Legislature passed a special statute establishing a separate school district for Kiryas Joel.[111] The school district was unique in that it did not provide general educational programs, as the overwhelming majority of children in Kiryas Joel received their education at religious schools, "relying on the new school district only for transportation, remedial education, and health and welfare services."[112] The school district only ran a special education program, which attracted students not only from Kiryas Joel, but also Hasidic children from the surrounding area.[113] The statute creating the school district was challenged as impermissible under the Establishment Clause.[114] The Court found, by a 6–3 vote, that the creation of the district violated the Establishment Clause—but stark divisions in conceptions of delegation and the true nature of the violation were laid bare by the various opinions. And, as I will explain in Part III, the use of the *eruv* in redistricting can run afoul of each of these opinions.[115]

a. Justice Souter's Majority and Plurality Opinion

Three Justices (Blackmun, Stevens, and Ginsburg) signed onto the entirety of Justice Souter's opinion, and Justice O'Connor joined all but one section of his opinion.[116]

The four-Justice plurality found the statute to present a variant of the problem raised in *Grendel's Den*: Justice Souter cast the lesson from that case as instructing that "a State may not delegate its civic authority"—here, the authority over public schools—"to a group chosen according to a religious criterion."[117] Justice Souter noted that while the delegation in *Grendel's Den* was to a church council and the delegation at issue here was to the "qualified voters of the

[111] *Id.* at 693.
[112] *Id.* at 694.
[113] *Id.* As much as two-thirds of the students came from outside the school district. *Id.*
[114] *Id.* at 690.
[115] *See infra* Part III.
[116] *Id.* at 688–89.
[117] *Id.* at 698 (plurality opinion).

village of Kiryas Joel," as far as the Establishment Clause is concerned, this was a distinction without a difference.[118] Rather than focusing on the identities of the recipients of state power, Justice Souter emphasized that just as in *Grendel's Den*, the delegation occurred *on the basis of religion*—"[w]here 'fusion' is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority."[119] The fear animating both decisions was the same: the potential for unconstrained exercise of political power that works to advance religious ends.[120]

The plurality went beyond the text of the statute—which only delegated power to the residents of Kiryas Joel—to tease out its constitutional defects.[121] The plurality found that this was an instance of delegation on the basis of religion, despite the statute's facial neutrality.[122] To come to this conclusion, the plurality focused on various factors bearing on the statute's uniqueness, which reflected its impermissible features. Justice Souter cited the legislature's awareness that Kiryas Joel's population was exclusively Satmar;[123] the fact that the district's establishment involved dividing an existing school district, rather than consolidating school districts, bucking New York's general districting trends;[124] and the act's passage as a special act, rather than under New York's general laws regarding school districting[125] as evincing the impermissibly delegative quality of the school district, reasoning that "customary and neutral principles would not have

[118] *Id.* (internal citations omitted).
[119] *Id.* at 699.
[120] *See id.* at 698 (referencing "political control"); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125 (1982) ("The churches' power under the statute is standardless . . . . [I]t could be employed for explicitly religious goals . . . .").
[121] *See Kiryas Joel*, 512 U.S. at 699 (plurality opinion).
[122] *See id.*
[123] *Id.* at 700.
[124] *Id.*
[125] *Id.* at 700–01.

dictated the same result."[126] Ultimately, the plurality found the creation of the school district to be "substantially equivalent to defining a political subdivision and hence the quality for its franchise by a religious test, resulting in a purposeful and forbidden 'fusion of governmental and religious functions.'"[127]

The majority, with Justice O'Connor in tow, found issue with another impermissible aspect of the school district statute: the fact that its unique nature raised concern that such a benefit would not be provided equally to others—so there was no "'effective means of guaranteeing' that governmental power [would] be and ha[d] been neutrally employed."[128] The majority was concerned that there was no way to ensure that the next group similarly situated would receive such a legislative benefit, a situation that would, troublingly, be judicially unreviewable.[129] The scheme here was more than an accommodation, and instead, was "an adjustment to the Satmars' religiously grounded preferences."[130] Proper accommodations would include receiving the necessary instruction at a public school run by the Monroe–Woodbury school district, or a separate program taught at a neutral site near the religious schools.[131]

Despite the superficial uniformity of a 6–3 opinion, the Court's inability to settle on a rationale for the impermissibility of the Kiryas Joel scheme was evidenced by the divide between the majority and the plurality, as well as the presence of multiple contradictory concurrences.

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[126] *Id.* at 702.
[127] *Id.* (quoting Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982)).
[128] *Id.* at 702–03 (majority opinion) (quoting *Grendel's Den*, 459 U.S. at 125).
[129] *See id.* at 703 ("[W]e have no assurance that the next similarly situated group seeking a school district of its own will receive one; . . . a legislature's failure to enact a special law is itself unreviewable."); *see also id.* ("The fundamental source of constitutional concern here is that the legislature itself may fail to exercise governmental authority in a religiously neutral way.").
[130] *Id.* at 706.
[131] *Id.* at 707.

b. The Concurrences

Justice Stevens's concurrence was joined by Justice Blackmun and Justice Ginsburg.[132] In addition to the reasons given by the majority and plurality, he found the creation of the school district to be an establishment of religion because rather than promote interreligious and intercultural tolerance and understanding,[133] the creation of the school district entrenched the Satmars' separation from the wider world, thus "provid[ing] official support to cement the attachment of young adherents to a particular faith."[134] Moreover, Justice Stevens found it significant that most of the students in the school district came from outside Kiryas Joel, indicative of the fact that religion, not geography, was the predominant focus in creating the district.[135]

Justice O'Connor, in a solo concurrence, noted that equal treatment is the *sine qua non* of the Establishment Clause.[136] She reasoned that accommodations must not be for the purpose of "making life easier for a particular religious group as such," but rather, accommodation must be rooted in the fact that religious adherents have a "deeply held belief."[137] For Justice O'Connor, the law at issue "single[d] out a particular religious group for favorable treatment," and thus was not a general accommodation.[138] She opined that if there were a generally applicable, neutral law setting forth the criteria for establishing a school district, the creation of this district under such criteria would pose no Establishment Clause issue.[139] Like the majority, she was concerned that

[132] *Id.* at 711 (Stevens, J., concurring).
[133] *See id.*
[134] *Id.*
[135] *Id.*
[136] *See id.* at 715 (O'Connor, J., concurring) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."); *see also* Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) ("[T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community.")
[137] *See Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring).
[138] *Id.* at 716.
[139] *See id.* at 717.

another group in a similar position would not receive such treatment from the legislature.[140] Picking up the thread from her *Aguilar* dissent[141] and presaging *Aguilar*'s reversal in *Agostini*,[142] Justice O'Connor argued that providing such services on the grounds of religious schools using public funds would be a permissible accommodation, and the refusal to do so weaponized the Establishment Clause to display hostility toward religion, instead of the required neutrality.[143]

Justice Kennedy, concurring in the judgment only, resisted the majority's view of the case because it unduly constrained the legislature from addressing the unique burdens imposed on a religious group—in effect, "adjudg[ing] the New York Legislature guilty until it proves itself innocent."[144] Instead, what transformed an otherwise permissible accommodation into an Establishment Clause violation was the necessity of drawing political lines based on religion.[145] For Justice Kennedy, a "fundamental limitation" of the Establishment Clause

> is that government may not use religion as a criterion to draw political or electoral lines. Whether or not the purpose is accommodation and whether or not the government provides similar gerrymanders to people of all religious faiths, the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion. The danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial.[146]

Justice Kennedy distinguished the creation of the town itself from the creation of the school district, as the former was accomplished through a generally applicable, neutral law, whereas the

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[140] *See id.* at 716; *see also supra* Section I.C.2.a.
[141] *See* Aguilar v. Felton, 473 U.S. 402, 421–31 (1985) (O'Connor, J., dissenting).
[142] *See* Agostini v. Felton, 521 U.S. 203 (1997).
[143] *See Kiryas Joel*, 512 U.S. at 717–18 (O'Connor, J., concurring). Justice O'Connor also noted, with satisfaction, that in her view, the Court's opinion evinced a lessened reliance on the *Lemon* test—enabling more circumstance-specific tests to arise that would lead to more reasoned decisionmaking. *Id.* at 718–21. It was this portion of Justice O'Connor's concurrence that prompted Justice Blackmun to concur separately, arguing for the continued vitality of the *Lemon* test. *Id.* at 710–11 (Blackmun, J., concurring).
[144] *Id.* at 722, 726 (Kennedy, J., concurring).
[145] *See id.* at 728 ("This particularity takes on a different cast, however, when the accommodation requires the government to draw political or electoral boundaries.").
[146] *Id.*

latter required a special legislative act.[147] Thus, there was a difference between a town whose residents happen to share the same religion, and "the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples' faith."[148] In this "unusual action,"[149] such "explicit religious gerrymandering" violated the Establishment Clause.[150]

c. The Dissent

Justice Scalia wrote a fiery dissent, joined by Chief Justice Rehnquist and Justice Thomas.[151] He trained his focus on the Kiryas Joel school itself, noting how it looked and functioned like any other school, rendering the issue one of "public aid to a school that is as public as can be. The only thing distinctive about the school is that all the students share the same religion."[152] Justice Scalia claimed that Justice Souter misinterpreted *Grendel's Den* by ignoring the difference between a delegation of civil authority to a church (impermissible) and the delegation of civil authority to members of a particular faith (permissible).[153] The school district at issue fell into the latter category, and by finding it unconstitutional, Justice Scalia saw the Court as acting to disfavor religion, something forbidden by the Religion Clauses.[154]

For Justice Scalia, this was simply a "special case, requiring special measures."[155] And the existence of special measures alone did not prove the presence of religious favoritism[156]—indeed, Justice Scalia quarreled with the supposition that religious differences formed the basis of New

[147] *See id.* at 729.
[148] *Id.*
[149] *Id.* at 730.
[150] *Id.* at 729.
[151] *Id.* at 732 (Scalia, J., dissenting).
[152] *Id.* at 733.
[153] *Id.* at 735.
[154] *See id.* at 736 (noting previous instances where the Court had found that "*disfavoring* of religion [was] positively antagonistic to the purposes of the Religion Clauses").
[155] *Id.* at 740. Justice Scalia also disputed the extent to which the school district was special, noting the existence of a similar arrangement for hospitalized children. *See id.* at 738.
[156] *Id.* at 740.

York's action. Instead, he argued that the basis was *cultural*: "[I]t was not theology but dress, language, and cultural alienation that posed the educational problem for the children."[157] Regardless, even if religious differences animated the Legislature's action, Justice Scalia viewed this as a "permissible accommodation,"[158] and criticized the majority for its desire for "'up front' assurances" of legislative neutrality[159]: "Making law (and making exceptions) one case at a time . . . violates, *ex ante*, no principle of fairness, equal protection, or neutrality simply because it does not announce in advance how all future cases (and all future exceptions) will be disposed of."[160]

Importantly, Justice Scalia recognized the existence of the Establishment Clause nondelegation doctrine but conceived of it in a much narrower manner than Justice Souter did.[161] Thus, at the end of *Kiryas Joel*'s bitterly divided opinions, we see nine justices contemplating the cognizability of Establishment Clause nondelegation claims while disagreeing about what circumstances constitute an impermissible delegation.

Part II. Between the Lines: Communities of Interest

The decennial redistricting process is fraught with controversy, consistently spawning a multitude of lawsuits.[162] The roots of such disputes are manifold: At a base level, the constitutional command of one person, one vote—requiring that congressional and state legislative districts have roughly equal populations[163]—inherently engenders a view of redistricting as a zero-sum endeavor, where every exercise of line-drawing has the potential to spell political gain or

[157] *Id.*
[158] *See id.* at 743–45 (summarizing past instances of accommodation).
[159] *Id.* at 747.
[160] *Id.* at 748.
[161] *See supra* note 153 and accompanying text.
[162] *See, e.g.*, *Redistricting Litigation Roundup*, BRENNAN CTR. FOR JUST. (Dec. 20, 2021), https://www.brennancenter.org/our-work/research-reports/redistricting-litigation-roundup-0 (listing twenty-six redistricting litigations in the 2021 cycle).
[163] *See generally* Reynolds v. Sims, 377 U.S. 533 (1964) (setting forth the one person, one vote standard).

disadvantage. Of course, this view is reinforced by the Supreme Court's *Rucho v. Common Cause* decision, holding partisan gerrymandering claims federally nonjusticiable.[164]

Layered on top of the one person, one vote baseline are the sometimes-conflicting requirements of both the Constitution and the Voting Rights Act: Race must be taken into account in redistricting to comply with the Voting Rights Act and to avoid racial vote dilution,[165] but an excessive consideration of race in redistricting raises constitutional concerns and triggers strict scrutiny.[166] In effect, a Goldilocks scenario results: Too little of a consideration of race raises the specter of running afoul of the Voting Rights Act, and too much of a consideration of race risks a constitutional violation. Race needs to be considered in a way that is "just right," namely, to comply with the Voting Rights Act.[167]

Later cases have clarified that in order for strict scrutiny to be triggered, race-based considerations must predominate over nonracial, traditional districting criteria.[168] These criteria include "compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests."[169] It is on this last criterion that this Part focuses: Section II.A describes the difficulties and vagaries inherent in defining communities of interest, and Section II.B explores the practice and permissibility of considering religious groups as communities of interest.

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[164] 139 S. Ct. 2484, 2056–57 (2019).
[165] *See generally* Thornburg v. Gingles, 478 U.S. 30 (1986) (establishing the criteria for determining the presence of racial vote dilution, requiring remedial action under the Voting Rights Act).
[166] *See* Shaw v. Reno, 509 U.S. 630, 644 (1993).
[167] The Supreme Court has "long assumed" that Voting Rights Act compliance is a compelling interest, and to satisfy narrow tailoring, a state must "show . . . that it had 'good reasons' for concluding that the statute required its action." Cooper v. Harris, 137 S. Ct. 1455, 1464 (2017) (quoting Al. Legislative Black Caucus v. Alabama, 575 U.S. 254, 278 (2015)).
[168] *See* Bethune-Hill vs. Va. State Bd. of Elections, 137 S. Ct. 788, 797 (2017) (citing Miller v. Johnson, 515 U.S. 900, 916 (1995)).
[169] *Miller*, 515 U.S. at 916.

A. Defining Communities of Interest

There is a central paradox inherent in any study of communities of interest: While the Supreme Court has noted that consideration of communities of interest is a traditional input in the redistricting process,[170] communities of interest have been defined, at most, at an abstract level.[171] Generally, communities of interest are "groupings of people who have similar values, shared interests, or common characteristics."[172] Various states have sought to provide more concrete definitions of communities of interest,[173] and "racial, ethnic, and language minority groups" can be considered communities of interest.[174] Many states, such as California, task their redistricting commissions with taking public testimony to identify communities of interest.[175]

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[170] *Id.* Many states also independently require a consideration of communities of interest. *See Communities of Interest*, BRENNAN CTR. FOR JUST. (Nov. 2010), https://www.brennancenter.org/sites/default/files/analysis/6%20Communities%20of%20Interest.pdf (listing, as of 2010, twenty-four states requiring consideration of communities of interest in districting); Glenn D. Magpantay, *A Shield Becomes a Sword: Defining and Deploying a Constitutional Theory for Communities of Interest in Political Redistricting*, 25 BARRY L. REV. 1, 7–8 (2020) (listing thirty-three states) .

[171] *See, e.g.*, Stephen J. Malone, Note, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461, 462 ("*Miller* provides no definition for community of interest . . . ."); David Willner, Comment, *Communities of Interest in Colorado Redistricting*, 92 U. Colo. L. Rev. 563, 564 (2021) ("The communities of interest criterion has been regularly criticized for its vagueness and lack of a definable standard.").

[172] Magpantay, *supra* note 170, at 1.

[173] The Colorado Constitution, for example, defines a community of interest as "any group in Colorado that shares one or more substantial interests that may be the subject of federal legislative action, is composed of a reasonably proximate population, and thus should be considered for inclusion within a single district for purposes of ensuring its fair and effective representation." COLO. CONST. art. 5, § 44(b)(I); *see also* Willner, *supra* note 171, at 564 (describing Colorado's recent expansion of the definition, emerging from a voter initiative).

[174] COLO. CONST. art. 5, § 44(b)(II)–(III); *see also infra* Section II.B. While beyond the scope of this Note, the consideration of race in determining communities of interest creates a tension within the constitutional voting rights jurisprudence, as it forms part of the traditional, non-race-based considerations that racial considerations must not predominate over. *See* Malone, *supra* note 171, at 462 ("On one hand, consideration of race is unconstitutional if it is the predominant factor. On the other hand, the intentional consideration of race and deliberate creation of districts with a certain racial composition may be acceptable if the district genuinely is drawn in the name of recognizing a community of interest.").

[175] *See* JUSTIN LEVITT, BRENNAN CTR. FOR JUST., A CITIZEN'S GUIDE TO REDISTRICTING 56 (2010), https://www.brennancenter.org/media/280/download; Karin Mac Donald & Bruce E. Cain, *Community of Interest Methodology and Public Testimony*, 3 U.C. IRVINE L. REV. 609, 611 (2013) ("Given that a finite number of commission members cannot possibly reflect all the nuanced, varied interests that arise in a large state redistricting, public input is critical to providing line-drawing guidance.").

Yet despite such efforts, defining such communities is inevitably a "fuzzy" practice.[176] As Professor Glenn Magpantay notes, the practice involves blending the objective, externally imposed geography of neighborhoods with the subjective, internally defined conception of communities.[177] Difficulties and ambiguities abound: For starters, definitions of communities shift over time.[178] Even if these definitions were somehow static, there remains the more stubborn problem of community members often having differing conceptions of who is considered part of the community.[179] Not only will different views of community membership often lead to competing conceptions of a community's geography, but conceptions of communities are not always easy to translate geographically in the first place.[180] Tradeoffs in community representation are unavoidable due to the zero-sum nature of redistricting: Unifying one community in a district often entails spreading another community across districts.[181] The existence of such tradeoffs highlights the fundamental subjectivity that lies at the core of defining communities of interest.[182]

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[176] *See* LEVITT, *supra* note 175, at 56 ("In practice, defining particular communities of interest can be notoriously fuzzy, because shared interests may be either vague or specific, and because people both move locations and change their interests over time."); Mac Donald & Cain, *supra* note 175, at 612 (observing that communities of interest "are harder to identify a priori because there is a subjective component to the interests and boundaries of a given" community).

[177] *See* Magpantay, *supra* note 170, at 8.

[178] *See* LEVITT, *supra* note 175, at 56.

[179] *See* Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903, 1949 n.217 (2012). Relatedly, one can imagine the proliferation of questions of who can legitimately speak for and define a community.

[180] *See* Mac Donald & Cain, *supra* note 175, at 612 ("[Community of interest] geography is ultimately subjective as well. The boundaries of an interest 'community' do not usually coincide neatly with government jurisdictions or follow fixed, uniform patterns."); *see also* Magpantay, *supra* note 170, at 9–10 (arguing that communities often exist based on shared experiences, even if members are geographically dispersed).

[181] *See* Willner, *supra* note 171, at 606 ("The upshot of the process is that by choosing one community of interest to unify in a district, the commission may end up dividing another."). One noteworthy example of such a tradeoff can be found in the facts of *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977), where, in order to comply with the Voting Rights Act's command of nonretrogression in minority voting power, Hasidic Jews in Brooklyn, who previously had been located within one state senate and one state assembly district, were divided into two state senate and two state assembly districts to create districts with nonwhite majorities. *Id.* at 152.

[182] *See* Willner, *supra* note 171, at 604 ("Commissioners should be aware that they are making inherently subjective decisions when deciding which communities should be considered for redistricting purposes and which ones should not.").

B. Religious Communities as Communities of Interest

As the Maryland example from the Introduction shows, religious communities often serve as communities of interest.[183] Some states, such as Arizona, have explicitly included religious groups in their definition of communities of interest.[184] Other states routinely consider religious communities as communities of interest.[185] The Supreme Court has also intimated that religion may properly be considered in the redistricting process: In *Shaw v. Reno*,[186] the first case to declare that excessive consideration of race in redistricting could give rise to a constitutional violation, the majority wrote,

> [R]edistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.[187]

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[183] *See supra* Introduction.

[184] *See Definitions*, ARIZ. INDEP. REDISTRICTING COMM'N, https://azredistricting.org/2001/Definitions.asp (2011) (defining communities of interest, for the 2001 redistricting cycle, as "group[s] of people in a defined geographic area with concerns about common issues (such as *religion*, political ties, history, tradition, geography, demography, ethnicity, culture, social economic status, trade or other common interest) that would benefit from common representation" (emphasis added)); *see also* NATE PERSILY, MD. CITIZENS REDISTRICTING COMM'N, PRINCIPLES AND CRITERIA FOR THE MARYLAND REDISTRICTING PROCESS 15 (2021), https://redistricting.maryland.gov/Documents/Meetings/2021-0901-Persily-to-MCRC.pdf (incorporating the Arizona definition into materials for Maryland's 2021 redistricting cycle).

[185] *See* Jeffrey Rosen, Kiryas Joel *and* Shaw v. Reno*: A Text-Bound Interpretivist Approach*, 26 CUMB. L. REV. 387, 394 (1996) ("Surely, Justice Kennedy does not mean to suggest that the Constitution prohibits state legislatures from being conscious of religion when they draw election districts. As Justice Ginsburg noted in her dissent in *Miller*, predictions about how Catholics, or Jews, or Irish Americans would vote have been a staple of American districting ever since the Founding." (citing Miller v. Johnson, 515 U.S. 900, 944–45 (1995) (Ginsburg, J., dissenting))); Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L. 735, 780 (2002) ("[*R*]*eligious communities*, ethnic communities, . . . and a host of other 'communities of interest' are routinely considered by districting bodies in order to construct fair and effective maps. Shared racial background, along with political affiliation, ethnic identity, *religious affiliation*, occupational background, all can converge to create bona fide communities of interest . . . ." (emphasis added) (footnote omitted)); *see also* Holt v. 2011 Legis. Reapportionment Comm'n, 38 A.3d 711, 746 (Pa. 2012) (quoting Gormley, *supra*, at 779–81) (quoting, *inter alia*, the above-mentioned portion of the Gormley article); *cf.* Magpantay, *supra* note 170, at 11 (noting that census data from the American Community Survey can be used to identify religious commonalities); Thomas C. Berg, *Religion, Race, Segregation, and Districting: Comparing* Kiryas Joel *with* Shaw/Miller, 26 CUMB. L. REV. 365, 379–80 (1996) ("The Establishment Clause's goal of preserving political unity does not justify a flat prohibition on drawing towns or school districts around a religious group.").

[186] 509 U.S. 630 (1993).

[187] *Id.* at 646.

However, consideration of religious groups in the community of interest analysis has the potential to raise constitutional concerns. In *Shaw*, the majority cited with approval a passage from Justice Douglas's dissent in *Wright v. Rockefeller*, where he argued

> [w]hen racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing . . . .[188]

Similar concerns were expressed by Justice Powell in *Committee for Public Education & Religious Liberty v. Nyquist*,[189] who, in an opinion invalidating a New York statute providing aid to parochial schools, feared the "potentially divisive political effect of an aid program" and the possibility for resultant civil strife as religious groups continue to seek such aid.[190] Indeed, "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[191]

By the same token, a total refusal to take religion into account in the community of interest analysis might itself raise Free Exercise concerns. Discrimination against religion has animated much of the Supreme Court's current Free Exercise jurisprudence,[192] with members of the current Court especially solicitous of such claims.[193] Justices and commentators have noted that the

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[188] *Id.* at 648–49 (quoting Wright v. Rockefeller, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting)).
[189] 413 U.S. 756 (1973).
[190] *See id.* at 795–96; *see also* Lemon v. Kurtzman, 403 U.S. 602, 623 (1971) ("The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow.").
[191] *Lemon*, 403 U.S. at 622.
[192] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 542 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").
[193] *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729–31 (2018) (finding that the Colorado Civil Rights Commission engaged in religious discrimination based on the statements of two of seven commissioners); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1877 (2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." (citing *Masterpiece*, 138 S. Ct. at 1730–32)); Does v. Mills, 142 S. Ct. 17, 19 (2021) (Gorsuch, J., dissenting) (arguing, in an opinion joined by Justices Thomas and Alito, that Maine's lack of religious exemption in its COVID-19 vaccine

Roberts Court's receptiveness to Free Exercise claims has often led to a shrinking of the applicability of the Establishment Clause.[194] In addition to this doctrinal thrust, the fact that consideration of communities of interest is balanced against other criteria in the districting process likely serves as insulation against constitutional challenge.[195] However, while incorporating religious communities in the communities of interest analysis is not a *per se* constitutional violation, as the next Part will show, the use of the *eruv* in the redistricting process can be unconstitutional.

Part III. Putting God Between the Lines

The allure of using the *eruv* as a basis for redistricting is clear. In light of the difficulties inherent in defining and delineating communities of interest,[196] having a clear, objective boundary for a community of interest is an asset in the redistricting process. And the *eruv* "represents the rare situation in which the normative community is coextensive with the descriptive neighborhood."[197]

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mandate for healthcare workers constituted discrimination against religion); Linda Greenhouse, Opinion, *What the Supreme Court Did for Religion*, N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-religion.html ("*Lukumi* has now come to stand for the idea that the government needs a compelling reason for making any distinction between religion and nonreligion if the burden on religion can be described as even slightly heavier.").

[194] *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2288 (2020) (Breyer, J., dissenting) (chastising the majority, in a Free Exercise decision, for failing to properly account for the "'play in the joints' between that which the Establishment Clause forbids and that which the Free Exercise Clause requires, . . . leav[ing] [the Establishment Clause] doctrine a shadow of its former self" (quoting Locke v. Davey, 540 U.S. 712, 718 (2004))); *see also* Linda Greenhouse, Opinion, *The Supreme Court, Weaponized*, N.Y. TIMES (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/opinion/supreme-court-trump.html (describing *Carson v. Makin*, No. 20-1088 (U.S. argued Dec. 8, 2021), a pending Free Exercise case involving taxpayer funding for religious education, as one where "[t]he Establishment Clause, long understood as a barrier to taxpayer subsidy of religious education, was almost completely absent from the argument").

[195] *Cf.* Bethune-Hill vs. Va. State Bd. of Elections, 137 S. Ct. 788, 797 (2017) (holding that racial considerations must predominate over traditional districting criteria, including consideration of communities of interest, for there to be a constitutional violation); *infra* Section III.C.

[196] *See supra* Section II.A.

[197] Schragger, *supra* note 15, at 440; *see also* Fonrobert, *supra* note 15, at 10 ("Since the eruv as a ritual system entails forming an eruv community, it also operates as a tool to structure the relationship between insiders and outsiders, and it does so in relationship to residential space. In other words, it operates as a boundary-making device, quite concretely in relationship to the residential space of the neighborhood that the eruv community inhabits.").

Yet this presents a constitutional conundrum. As discussed above, erecting an *eruv* does not present Establishment Clause concerns.[198] Nor has incorporating religious groups in the communities of interest analysis been found impermissible.[199] So, in using an *eruv* as a basis for redistricting, how does the combination of two constitutional rights make a constitutional wrong? Sections III.A and III.B will sketch the contours of the impermissibility of using an *eruv* as a basis for redistricting, with the former rooted in the concerns raised by Justice Souter's majority opinion and Justice O'Connor's concurrence in *Kiryas Joel*, and the latter using Justice Souter's *Kiryas Joel* plurality opinion and Justice Kennedy's concurrence as touchstones. Section III.C will seek to craft a standard by which this unconstitutionality can be judged, using the Supreme Court's voting rights and Establishment Clause doctrines as a starting point.

A. Who Gets Religious Lines?: Justice Souter's Majority Opinion and Justice O'Connor's Concurrence

The majority in *Kiryas Joel* was concerned that the "special and unusual" circumstances giving rise to the creation of the school district meant that there was no way to ensure that future groups would receive a similar arrangement—raising the threat that the government would not act in a religiously neutral manner.[200] Justice O'Connor raised similar concerns in her concurring opinion.[201] Both Justice Kennedy and Justice Scalia took umbrage with this rationale, as it "reverse[d] the usual presumption that a statute is constitutional and, in essence, adjudge[d] the New York Legislature guilty until it proves itself innocent."[202] Incipient in such a critique was the

[198] *See supra* Section I.B.
[199] *See supra* Section II.B.
[200] Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 702 (1994); *see also supra* Section I.C.2.a.
[201] *See Kiryas Joel*, 512 U.S. at 716–17 (O'Connor, J., concurring); *see also supra* Section I.C.2.b.
[202] *Kiryas Joel*, 512 U.S. at 726 (Kennedy, J., concurring); *see also id.* at 746–47 (Scalia, J., dissenting) ("The Court's demand for 'up front' assurances of a neutral system is at war with both traditional accommodation doctrine and the judicial role.").

rare nature of the challenged action, raising the question of if there ever would be a second coming of such an arrangement.[203]

In the redistricting context, the concerns raised by the majority are amplified, and those raised by Justices Kennedy and Scalia are minimized. As discussed above, in the redistricting process, tradeoffs are inherent—considerations of communities of interest must be balanced against desires for compactness, contiguity, and compliance with the Voting Rights Act.[204] If an *eruv* is used as a touchstone for the boundaries of one district, the zero-sum nature of the redistricting process means that a cascade of adjustments will need to be made to accommodate that district—and such adjustments are not limited to adjoining districts.[205] If an *eruv* is used in redistricting, it is not difficult to imagine, *in the same redistricting cycle*, a situation where another religious group would not be afforded similar treatment.[206] Indeed, it is conceivable that a religious "arms race" of sorts could develop, with different groups rushing to demarcate "their" territory in a manner similar to the *eruv*—precisely the kind of interreligious tension feared by various Justices in prior Establishment Clause cases.[207]

Even assuming that there is no interreligious analogue to the *eruv*, a district drawn along the *eruv* raises the potential of *intra*religious strife—such as between Orthodox Jews and Reform, Reconstructionist, Conservative, and nondenominational Jews, who may have differing views of

[203] *See id.* at 747 (Scalia, J., dissenting) ("[M]ost efforts at accommodation seeks [sic] to solve a problem that applies to members of only or a few religions.").
[204] *See* Miller v. Johnson, 515 U.S. 900, 916 (1995) (setting forth traditional districting criteria); Cooper v. Harris, 137 S. Ct. 1455, 1464 (2017) (assuming that compliance with the Voting Rights Act can serve as a compelling governmental interest); *supra* Part II.
[205] *See supra* note 5 and accompanying text. Though such adjustments satisfied the desires of both the Dundalk and Pikesville communities, a mutually beneficial outcome is by no means guaranteed. *See supra* note 181 and accompanying text.
[206] Indeed, it can be argued that this might be more likely if the *eruv* is used for redistricting, given the *eruv*'s utility in delineating a community's boundaries. *See supra* text accompanying notes 196–197.
[207] *See supra* notes 188–191 and accompanying text.

the salience of the *eruv* as a means of defining the boundaries of a community;[208] between Jewish groups disagreeing on the validity of a particular *eruv*;[209] or between geographically separate Jewish communities, one of which has a legislative district tracking the *eruv*, and the other without such a district. This would add an unwelcome theological dimension to the already thorny task of determining the degree to which intracommunity variation will rupture a community's cohesion.[210] Much as Justice O'Connor feared in *Kiryas Joel*, in this framework, "the government makes adherence to religion relevant to a person's standing in the political community."[211] Given the impracticality of satisfying all demands in the redistricting process, when the *eruv* is used as a basis to draw district lines, the Establishment Clause's "emphasis on equal treatment" becomes untenable.[212]

B. Drawing Religious Lines: Justice Souter's Plurality Opinion and Justice Kennedy's Concurrence

The rationales of Justice Kennedy's *Kiryas Joel* concurrence and Justice Souter's plurality opinion lend further support to the unconstitutionality of this use of the *eruv*. As discussed above, Justice Kennedy's chief qualm about the Kiryas Joel school district was that political lines were drawn on the basis of religion[213]: "[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion. . . . Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion."[214] Similarly, the plurality

[208] *See supra* notes **Error! Bookmark not defined.**–32 and accompanying text.
[209] *See* JNi.Media, *Newcomer Rabbinic Organization Launches Lower East Side Eruv Against Establishment View*, JEWISH PRESS (Sept. 30, 2016), https://www.jewishpress.com/news/breaking-news/newcomer-rabbinic-organization-launches-lower-east-side-eruv-against-establishment-view/2016/09/30.
[210] *See supra* notes 188–191 and accompanying text; League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 434–35 (2006) (criticizing, in a Voting Rights Act analysis, the failure to account for community divisions within a racial group).
[211] *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring) (quoting Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring)).
[212] *Id.*
[213] *See supra* Section I.C.2.b.
[214] *Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring).

was concerned with "the way the boundary lines of the school district divide residents according to religious affiliation."[215]

Drawing a legislative district around an *eruv* is qualitatively different than merely taking religion into account in the communities of interest analysis. Where the government is merely *aware of* religion in districting, the religious composition of a district is wholly the result of private actions[216]—akin to the logic the Supreme Court used to find that desegregation in schooling did not require the traversing of school district lines, even though the individual school districts were racially homogenous.[217] Such an analogy is particularly apt considering that in *Kiryas Joel*, Justice Kennedy envisioned the Establishment Clause as "mirror[ing]" the Equal Protection Clause.[218] But Justice Kennedy saw "more than a fine line, however, between the voluntary association that leads to a political community comprised of people who share a common religious faith, and the forced separation that occurs when the government draws explicit political boundaries on the basis of peoples' faith."[219] Or, as the plurality put it: "Where 'fusion' is an issue, the difference lies in the distinction between a government's purposeful delegation on the basis of religion and a delegation on principles neutral to religion, to individuals whose religious identities are incidental to their receipt of civic authority."[220]

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[215] *Id.* at 699 (plurality opinion).
[216] This was Justice Scalia's chief criticism of Justice Kennedy's concurrence: He argued that because the boundaries of Kiryas Joel were themselves constitutionally permissible (as Justice Kennedy conceded), a school district drawn along those same lines should also be survive constitutional scrutiny. *See id.* at 749 (Scalia, J., dissenting).
[217] *See* Abner S. Greene, Kiryas Joel *and Two Mistakes About Equality*, 96 Colum. L. Rev. 1, 33 (1996) ("Government may not officially segregate whites and African Americans, but if private citizens move to relatively homogeneous neighborhoods, government is not required to draw school attendance zones across neighborhoods.").
[218] *See Kiryas Joel*, 512 U.S. at 728 (Kennedy, J., concurring) ("[T]he the Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause.").
[219] *Id.* at 730. This is, in effect, the difference between a government awareness of religious segregation and active governmental segregation on the basis of religion. *See id.* at 728 ("Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion.").
[220] *Id.* at 699 (plurality opinion).